(23,862)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 711.

JAMES SIM, PETITIONER,

vs.

WILLIAM EDENBORN.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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UNITED STATES OF AMERICA, ss.:

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To the Judges of the District Court of the United States for the Eastern District of New York,

GREETING:

Because, in the record and proceedings, as also 2
in the rendition of the judgment of a plea which is in the District Court, before you, or some of you, between James Sim, as plaintiff, and William Edenborn, as defendant, a manifest error hath happened, to the great damage of the said William Edenborn as is said and appear by his complaint. We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, DO COMMAND YOU, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Judges of 3
the UNITED STATES CIRCUIT COURT OF APPEALS for the Second Circuit, at the City of New York, together with this writ, so that you have the same at the said place, before the Judges aforesaid, on the 9th day of November, 1912, that the record and proceedings aforesaid being inspected, the said Judges of the UNITED STATES CIRCUIT COURT OF APPEALS for the Second Circuit may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

WITNESS, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 11th day of October, in the [L. S.] year of our Lord one thousand nine hundred and twelve, and of the Independence of the United States the one hundred and thirty-seventh.

RICHARD P. MORLE,
Clerk of the District Court of the United States of America, for the Eastern District of New York, in the Second Circuit.
By J. G. COCHRAN,
Deputy Clerk.

The foregoing writ is hereby allowed.

THOMAS I. CHATFIELD,
U. S. District Judge.

Summons. 7

SUPREME COURT,

COUNTY OF KINGS.

JAMES SIM,
Plaintiff,

vs.

WILLIAM EDENBORN,
Defendant.

Trial desired in Kings County. 8

To the above named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty (20) days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint. 9

Dated, April 10th, 1907.

THERON G. STRONG,
Plaintiff's Attorney,
Office and P. O. Address,
49 Wall St.,
Borough of Manhattan,
City of New York.

10 **Complaint.**

SUPREME COURT,

KINGS COUNTY.

JAMES SIM,
Plaintiff,

against

11 WILLIAM EDENBORN,
Defendant.

The plaintiff complains of the defendant and alleges:

FOR A FIRST CAUSE OF ACTION.

FIRST.—On or about the 15th day of April, 1902, and until the first day of January, 1903, and subsequent thereto, defendant was engaged in promoting, forming and carrying out a syndicate
12 agreement to purchase, develop and dispose of certain lands and properties, and for the purchase of the United States Iron Company of New Jersey then capitalized at $1,000,000 and its properties, and to that end, prepared an agreement, dated April 15, 1902, and inserted therein as syndicate managers his own name, and the name of August Mann, his nephew, and J. C. Walker an employee, of a company with which defendant was then connected, and submitted the same to the subscribers thereto, to procure their subscriptions to the same. That under said agreement said syn-

dicate managers were to have, and had the direc- 13
tion and management of the subject-matter of such syndicate, and each subscriber nominated and appointed the syndicate managers, his agents and attorneys, until the termination of said agreement and the defendant undertook to act under said agreement as one of such syndicate managers for the benefit and advantage of the subscribers thereto.

SECOND.—The defendant, being such promoter, a syndicate manager, and the agent and attorney of the subscribers, in exercising the power and authority conferred by said syndicate agreement 14
occupied a relation of trust and confidence toward the subscribers to said syndicate, and it was his duty to make to said subscribers, full disclosure of all facts and circumstances which were within defendant's knowledge, which said subscribers ought to have known in order to enable them to form an independent judgment and protect their interests and the plaintiff had unlimited trust and confidence in the defendant, and relied on and trusted him to the fullest extent, believing that he was worthy of trust and confidence.

THIRD.—That subsequent to the 15th day of 15
April, 1902, but prior to the 20th day of July, 1902, defendant proposed to the plaintiff to become a subscriber to the said syndicate agreement, and, as an inducement so to do, represented and stated to him that the enterprise was being organized in good faith, that each of the subscribers, according to their interests, had equal rights and stood on the same basis, that every man would put up his dollar against every other man's dollar, and that there were to be no special advantages to anyone and that the syndicate proposed to purchase only valuable and paying properties,

and that each subscription was to be payable in dollars, and that he had made a subscription for $500,000 payable in dollars.

FOURTH.—That as a further inducement to subscribe thereto defendant in and by said agreement represented and stated to the subscribers thereto that an opportunity was afforded to acquire for a cash consideration the ownership, control and possession of the United States Iron Company of New Jersey, capitalized at $1,000,000 at par. That at or about the time defendant prepared the said syndicate agreement and induced the plaintiff to subscribe thereto, the defendant was the owner of about 5,365 out of a total of 9,250 shares of the stock of the said United States Iron Company, and with intent to deceive and defraud the plaintiff and other subscribers had conceived the design and intention of selling and transferring his said stock to the said syndicate managers for cash, at par, and in so doing to relieve himself of said stock and to impose the same upon the persons whom he had induced to become subscribers to said agreement, and by fraud and deceit and intending to deceive and defraud the plaintiff herein, concealed from plaintiff and other subscribers the fact that the defendant owned a majority of the capital stock of the United States Iron Company, and controlled said company; that said stock had never yielded any dividends; that there was no market value for the same; that it was of little or no value, and that defendant intended to surrender and dispose of said stock to the said syndicate managers for cash subscribed by the subscribers to said agreement, instead of paying the said subscription in cash, which surrender and disposition was afterwards carried out by him.

FIFTH.—That, as plaintiff is informed and believes, defendant herein and one August Mann, being syndicate managers aforesaid, intending to deceive and defraud plaintiff and other subscribers, conceived and concocted a scheme or plan, which they afterwards carried out and accomplished, whereby a certain syndicate agreement in which the said August Mann had an interest should be transferred to said defendant's syndicate and imposed upon said subscribers, and that said syndicate in which the said Mann was interested, should receive $1,000 and one thousand shares of stock in the Sheffield Coal & Iron Company hereinafter mentioned, and with intent to deceive and defraud the plaintiff and other subscribers to said syndicate agreement concealed from him and them the fact that the said syndicate in which said Mann was interested, would be or had been purchased, and that said Mann was largely interested therein, and that the defendant and the said Mann had taken advantage of their position as syndicate managers, as aforesaid.

SIXTH.—That each and every of the said statements and representations made by the defendant were false and fraudulent and known by him to be so and were made with intent to deceive and defraud the plaintiff and other subscribers; that the said syndicate was not being organized by defendant in good faith; that each of the subscribers, according to their interests, did not have equal rights and did not stand upon the same basis; that every man did not put up his dollar against every other man's dollar; that there were special advantages to the defendant and to the said August Mann; that the syndicate did not propose to purchase only valuable and paying properties; that

the defendant's subscription was not paid in dollars and that he did not intend to pay the same in dollars in accordance with his subscription; that the plaintiff relied upon the truth of said statements and representations and believed the same to be true and did not have any knowledge or information to the contrary until in or about the month of November, 1906, and so relying and believing subscribed to said syndicate agreement and paid the sum of $15,000 to said syndicate managers, as follows: $3,750 on July 20th, 1902; $5,250 on August 30th, 1902; $3,750 on November 29th, 1902; and $2,250 on December 20th, 1902; and received certificates of stock of the par value of One hundred ($100) Dollars each in the Sheffield Coal & Iron Company relying and believing as aforesaid and would not have made his subscription nor received the certificates of stock aforesaid if he had known that such statements, or any of them, were false or that the defendant having, as aforesaid, with intent to deceive and defraud the plaintiff and other subscribers concealed from them that the defendant was the owner of a majority of the stock of the said United States Iron Company and controlled said company and that said stock had never yielded any dividends; that there was no market value for the same; that it was of little or no value, and that defendant intended to surrender his stock in said United States Iron Company to said syndicate managers in part payment of his subscription, instead of paying the same in dollars and that he did not intend to pay in dollars the amount of said subscription and that the defendant and the said August Mann had conceived and concocted a scheme or plan whereby said syndicate in which said Mann was interested should be transferred to said syndicate managers and thereby be im-

posed upon said subscribers, and that the said syndicate managers were to pay to the said syndicate in which said Mann was interested One thousand ($1,000) dollars in cash and One thousand (1,000) shares of stock in the said Sheffield Coal & Iron Company. 25

SEVENTH.—That having induced the plaintiff to subscribe to said syndicate agreement and the plaintiff having subscribed thereto, the defendant being one of said syndicate managers and with intent to deceive and defraud the plaintiff and other subscribers, and as the means of carrying out their fraudulent purposes and designs, as 26
aforesaid, caused, as plaintiff is informed and believes, the name of said United States Iron Company to be changed to the Sheffield Coal & Iron Company and the stock thereof to be increased, and called upon the plaintiff for the payment of his subscription, which plaintiff paid, as aforesaid, and on or about the first day of January, 1903, defendant delivered to the plaintiff said certificates of stock in the said Sheffield Coal & Iron Company, which the plaintiff received, trusting and relying on defendant and having no knowledge or suspicion of the fraud, deceit and fraudulent concealment by the defendant, as aforesaid, and the 27
plaintiff has ever since held said certificates of stock and still holds the same.

EIGHTH.—That the plaintiff as soon as possible after the discovery by him of fraud and deceit and fraudulent concealment on the part of defendant practiced on him as aforesaid, notified said syndicate managers, including defendant, that he elected to rescind his subscription to said syndicate agreement and offered to return to defendant all that he received from him, to wit, the said cer-

tificates of stock and demanded payment of the amount so, as aforesaid, paid by him, which said offer and demand were refused, and that he ever since has been and now is ready and willing to deliver up said certificates of stock upon receiving payment of the amount paid by him as aforesaid.

NINTH.—That by reason of the premises the plaintiff claims that he is entitled to recover from defendant the sum so, as aforesaid, paid by him, to wit, fifteen thousand ($15,000) dollars, with interest on the sum of $3,750 from July 20, 1902; on $5,000 from August 30, 1902; on $5,750 from November 29, 1902, and on $2,250 from December 20, 1902.

FOR A SECOND CAUSE OF ACTION.

FIRST.—Plaintiff repeats and renews as a part hereof, as a cause of action in favor of Charles C. Cluff, the allegations of the first cause of action contained in Paragraphs First, Second, Third, Fourth and Fifth, with the same force and effect as if the same were again fully and at large set forth with the name of Charles C. Cluff inserted therein in place of plaintiff, and in addition thereto alleges:

SECOND.—That each and every of the said statements and representations made by the defendant were false and fraudulent and known by him to be so and were made with intent to deceive and defraud the said Cluff and other subscribers; that the said syndicate was not being organized by defendant in good faith; that each of the subscribers, according to their interests, did not have equal rights and did not stand upon the same

basis; that every man did not put up his dollar against every other man's dollar; that there were special advantages to the defendant and to the said August Mann; that the syndicate did not propose to purchase only valuable and paying properties; that the defendant's subscription was not paid in dollars and that he did not intend to pay the same in dollars in accordance with his subscription; that the said Cluff relied upon the truth of said statements and representations and believed the same to be true and did not have any knowledge or information to the contrary until in or about the month of November, 1906, and so relying and believing subscribed to said syndicate agreement and paid the sum of $15,000 to said syndicate managers, as follows: $3,750 on July 2, 1902; $5,250 on August 30, 1902; $3,750 on November 29, 1902, and $2,250 on December 20, 1902 and received certificates of stock of the par value of One hundred ($100) dollars each in the Sheffield Coal & Iron Company relying and believing as aforesaid and would not have made his subscription nor received the certificates of stock aforesaid if he had known that such statements, or any of them, were false, or that the defendant having, as aforesaid, with intent to deceive and defraud the said Cluff and other subscribers concealed from them that the defendant was the owner of a majority of the stock of the said United States Iron Company and controlled said company and that said stock had never yielded any dividends; that there was no market value for the same; that it was of little or no value, and that defendant intended to surrender his stock in said United States Iron Company to said syndicate managers in part payment of his subscription, instead of paying the same in dollars, and that he did not intend to pay in dollars the amount

of said subscription and that the defendant and the said August Mann had conceived and concocted a scheme or plan whereby said syndicate in which said Mann was interested should be transferred to said syndicate managers and thereby be imposed upon said subscribers, and that the said syndicate managers were to pay to the said syndicate in which said Mann was interested One thousand ($1,000) dollars in cash and one thousand (1,000) shares of stock in the Sheffield Coal & Iron Company.

THIRD.—That having induced the said Cluff to subscribe to said syndicate agreement and the said Cluff having subscribed thereto, the defendant being one of said syndicate managers and with intent to deceive and defraud the said Cluff and other subscribers, and as the means of carrying out their fraudulent purposes and designs, as aforesaid, caused, as plaintiff is informed and believes, the name of said United States Iron Company to be changed to the Sheffield Coal & Iron Company and the stock thereof to be increased, and called upon the said Cluff for the payment of his subscription, which said Cluff paid, as aforesaid, and on or about the first day of January, 1903, defendant delivered to the said Cluff said certificates of stock in the said Sheffield Coal & Iron Company, which the said Cluff received, trusting and relying on defendant and having no knowledge or suspicion of the fraud, deceit and fraudulent concealment by the defendant, as aforesaid, and the said Cluff has ever since held said certificates of stock until the assignment hereinafter mentioned.

FOURTH.—That the said Charles C. Cluff as soon as possible after the discovery by him of

fraud and deceit and fraudulent concealment on the part of defendant practiced on him as aforesaid, notified said syndicate managers, including defendant, that he elected to rescind his subscription to said syndicate agreement and offered to return to defendant all that he received from him, to wit, the said certificates of stock and demanded payment of the amount so, as aforesaid, paid by him, which said offer and demand were refused, and that he ever since has been and plaintiff now is ready and willing to deliver up said certificates of stock upon receiving payment of the amount paid by said Cluff, as aforesaid, with interest. 37 38

FIFTH.—That subsequent to the rescission, tender and demand aforesaid and before the commencement of this action, said Charles C. Cluff duly assigned to this plaintiff his claim and said cause of action against said defendant for and on account of the matters hereinbefore set forth.

SIXTH.—That by reason of the premises the plaintiff claims that he is entitled to recover from defendant the sum so, as aforesaid, paid by him, to wit, Fifteen thousand ($15,000) dollars, with interest on the sum of $3,750 from July 2nd, 1902; on $5,250 from August 30th, 1902; on $3,750 from November 29th, 1902; and on $2,250 from December 20th, 1902. 39

FOR A THIRD CAUSE OF ACTION.

FIRST.—Plaintiff repeats and renews, as a part hereof, as a cause of action in favor of Thomas B. Coles, the allegations of the first cause of action contained in paragraphs, First, Second, Third. Fourth and Fifth, with the same force and effect

as if the same were again fully and at large set forth with the name of Thomas B. Coles inserted therein in place of the plaintiff. and in addition thereto alleges:

SECOND.—That each and every of the said statements and representations made by the defendant were false and fraudulent and known by him to be so and were made with intent to deceive and defraud the said Coles and other subscribers; that the said syndicate was not being organized by defendant in good faith; that each of the subscribers according to their interests, did not have equal rights and did not stand upon the same basis; that every man did not put up his dollar against every other man's dollar; that there were special advantages to the defendant and to the said August Mann; that the syndicate did not propose to purchase only valuable and paying properties; that the defendant's subscription was not paid in dollars and that he did not intend to pay the same in dollars in accordance with his subscription; that the said Coles relied upon the truth of said statements and representations and believed the same to be true and did not have any knowledge or information to the contrary until in or about the month of November, 1906, and so relying and believing subscribed to said syndicate agreement and paid the sum of $20,000 to said syndicate managers as follows: $5,000 on July 3rd, 1902; $7,000 on September 2nd, 1902; $5,000 on July 3rd, 1902; $3,000 on December 22nd, 1902, and received certificates of stock of the par value of One hundred ($100) dollars each in the Sheffield Coal & Iron Company, relying and believing as aforesaid and would not have made his subscription nor received the

certificates of stock aforesaid if he had known that such statements, or any of them, were false or that the defendant, having, as aforesaid with intent to deceive and defraud the said Coles and other subscribers concealed from them that the defendant was the owner of a majority of the stock of the said United States Iron Company and controlled said company and that said stock had never yielded any dividends; that there was no market value for the same; that it was of little or no value, and that defendant intended to surrender his stock in said United States Iron Company to said syndicate managers in part payment of his subscription, instead of paying the same in dollars, and that he did not intend to pay in dollars the amount of said subscription and that the said defendant and the said August Mann had conceived and concocted a scheme or plan whereby said syndicate in which said Mann was interested should be transferred to said syndicate managers and thereby be imposed upon said subscribers, and that the said syndicate managers were to pay to the said syndicate in which said Mann was interested One thousand ($1,000) Dollars in cash and One thousand (1,000) shares of stock in the said Sheffield Coal & Iron Company.

THIRD.—That having induced the said Coles to subscribe to said syndicate agreement and the said Coles having subscribed thereto, the defendant being one of said syndicate managers and with intent to deceive and defraud the said Coles and other subscribers, and as the means of carrying out their fraudulent purposes and designs, as aforesaid, caused as plaintiff is informed and believes the name of said United States Iron Company to be changed to the Sheffield Coal & Iron

46 Company and the stock thereof to be increased and called upon the said Coles for the payment of his subscription, which said Coles paid, as aforesaid, and on or about the first day of January, 1903, defendant delivered to the said Coles said certificates of stock in the said Sheffield Coal & Iron Company, which the said Coles received, trusting and relying on defendant and having no knowledge or suspicion of the fraud, deceit and fraudulent concealment by the defendant, as aforesaid, and the said Coles has ever since held said certificates of stock until the assignment hereinafter mentioned.

47

FOURTH.—That said Thomas B. Coles as soon as possible after the discovery by him of fraud and deceit and fraudulent concealment on the part of the defendant practiced on him as aforesaid, notified said syndicate managers, including defendant, that he elected to rescind his subscription to said syndicate agreement and offered to return to said defendant all that he received from him, to wit, the said certificates of stock and demanded payment of the amount so, as aforesaid paid by him, which said offer and demand were refused,

48 and that he ever since has been and plaintiff now is ready and willing to deliver up said certificates of stock upon receiving payment of the amount paid by said Coles, as aforesaid, with interest.

FIFTH.—That subsequent to the rescission, tender and demand aforesaid and before the commencement of this action, said Thomas B. Coles duly assigned to this plaintiff his claim and cause of action against said defendant for and on account of the matters hereinbefore set forth.

SIXTH.—That by reason of the premises the plaintiff claims that he is entitled to recover from defendant the sum so, as aforesaid, paid by said Coles, to wit, Twenty Thousand ($20,000) dollars, with interest on the sum of $5,000 from July 3rd, 1902; on $7,000 from September 2nd, 1902; on $5,000 from December 1st, 1902; and on $3,000 from December 22nd, 1902. 49

FOR A FOURTH CAUSE OF ACTION.

FIRST.—Plaintiff repeats and renews as a part hereof as a cause of action in favor of Elmer E. Stone the allegations of the first cause of action contained in Paragraphs First and Second thereof with the same force and effect as if the same were again fully and at large set forth with the name of Elmer E. Stone inserted therein in place of plaintiff, and in addition thereto alleges: 50

SECOND.—That on or about the 2nd day of June, 1902, defendant proposed to the said Stone to become a subscriber to said syndicate agreement and as an inducement so to do represented and stated to him that certain persons, to wit, Messrs. Keefe, Merriman, Baackes and Watson had subscribed various sums thereto, and that it was proposed to acquire certain ore properties in the south selected by Messrs. Walker and Dickman and to acquire a coal property selected by Mr. Harper, fuel expert of the Illinois Steel Company, and to erect two blast furnaces in the neighborhod of Sheffield, Alabama; that said ore properties were being purchased at cost to the present owners; that the proposition was purely a business matter, no bonds to be issued, nor any common stock, nor any special advantages to accrue to anyone, and that he had made a subscription thereto of Five hun- 51

52 dred thousand ($500,000) dollars, payable in dollars and requested that the plaintiff authorize some one not a syndicate manager to subscribe his name and the amount of his subscription to said syndicate agreement.

THIRD.—That as a further inducement to subscribe thereto defendant in and by said agreement represented and stated to the subscribers thereto that an opportunity was afforded to acquire for a cash consideration the ownership, control and possession of the United States Iron Company of New Jersey at par, capitalized at $1,000,000. That at
53 or about the time defendant prepared said syndicate agreement and proposed to the said Stone to subscribe thereto, the defendant was the owner of about 5,365 out of a total of 9,250 shares of the stock of the said United States Iron Company, and with intent to deceive and defraud the said Stone and certain other subscribers had conceived the design and intention of selling and disposing of said stock to the said syndicate managers for cash, at par, and in so doing to relieve himself of said stock and to impose the same upon the persons whom he had induced to become sub-
54 scribers to said agreement, and by fraud and deceit and intending to deceive and defraud the said Stone herein, concealed from him and certain other subscribers the fact that the defendant owned a majority of the capital stock of the United States Iron Company and controlled said company. That said stock had never yielded any dividends; that there was no market value for the same; that it was of little or no value, and that defendant intended to sell and dispose of said stock to the said syndicate managers for cash subscribed by the subscribers to said agreement, in stead of paying the said subscription in cash,

which surrender and disposition was afterwards carried out by him. 55

FOURTH.—That, as plaintiff is informed and believes, defendant herein and one August Mann, being syndicate managers aforesaid, intending to deceive and defraud the said Stone and certain other subscribers, conceived and concocted a scheme or plan, which they afterwards carried out and accomplished whereby a certain syndicate agreement in which the said August Mann had an interest, should be transferred to said defendant's syndicate and imposed upon said subscribers, and that said syndicate in which the said Mann was 56
interested should receive $1,000 and one thousand shares of stock in the Sheffield Coal & Iron Company hereinafter mentioned, and with intent to deceive and defraud the said Stone and other subscribers to said syndicate agreement concealed from him and them the fact that the said syndicate in which said Mann was interested, would be or had been purchased, and that said Mann was largely interested therein, and that the defendant and the said Mann had taken advantage of their position as syndicate managers, as aforesaid.

57

FIFTH.—That each and every of the said statements and representations made by the said defendant were false and fraudulent and known by him to be so, and were made with intent to deceive and defraud the said Stone; that at least one of the persons named by defendant as having subscribed various sums to said syndicate agreement had not and never subscribed thereto; that it was not proposed to acquire certain ore properties in the south selected by Messrs. Walker and Dickman; that it was not proposed to acquire a coal property selected by Mr. Harper, fuel expert of

the Illinois Steel Company, nor to erect two blast furnaces in the neighborhood of Sheffield, Alabama; that said ore properties were not being purchased at cost to the present owners; that the proposition was not purely a business matter; that bonds were to be and were issued, and that there were special advantages to the defendant and to the said August Mann and that defendant did not intend to pay his subscription in dollars in accordance with his agreement, nor to pay the same in full. That the said Stone relied upon the truth of said statements and representations and believed the same to be true and did not have any knowledge or information to the contrary until in or about the month of November, 1906, and so relying thereon and believing authorized a subscription on his behalf in the sum of $5,000 to said agrement and paid said subscription in full and received a certificate for fifty (50) shares of the capital stock of the Sheffield Coal & Iron Company, and would not have authorized his subscription on his behalf nor received the certificate of stock aforesaid if he had known that any of such statements were false, or that the defendant having as aforesaid, with intent to deceive and defraud the said Stone had concealed from the said Stone the fact that the defendant was the owner of a majority of the stock of the said United States Iron Company and controlled said company; that said stock had never yielded any dividends; that there was no market value for the same; that it was of little or no value, and that defendant intended to sell the same to said syndicate managers and surrender his stock in said United States Iron Company in part payment of his subscription, instead of paying the same in dollars, and that he did not intend to pay in dollars the amount of the said subscription, or that the defendant and the

said August Mann had conceived and concocted a 61
scheme or plan whereby said syndicate in which said Mann was interested, should be transferred to said syndicate managers and thereby be imposed upon said subscribers and that the said syndicate managers were to pay to the said syndicate in which said Mann was interested, $1,000 in cash and one thousand shares of stock in the said Sheffield Coal & Iron Company.

SIXTH.—That having induced the said Stone to authorize a subscription on his behalf to said syndicate agreement and a subscription thereto having been made on his behalf, the defendant being 62
one of said syndicate managers and with intent to deceive and defraud the said Stone and other subscribers and as a means of carrying out his fraudulent purposes and designs as aforesaid, caused, as plaintiff is informed and believes, the name of said United States Iron Company to be changed to the Sheffield Coal & Iron Company and the stock thereof to be increased and called upon the said Stone for the payment of his subscription, which said Stone paid, and on or about the first day of January, 1903, defendant delivered to said Stone said certificates of stock in the said Sheffield 63
Coal & Iron Company, which said Stone received, trusting and relying on defendant and having no knowledge or suspicion of the fraud, deceit and fraudulent concealment by the defendant, as aforesaid, and the said Stone has ever since held said certificates of stock until the assignment hereinafter mentioned.

SEVENTH.—That subsequently and on or about September 25th, 1903, the defendant contrary to his statement and representation to the plaintiff and on which said Stone relied that no bonds were

64 to be issued, notified said Stone of an issue of bonds by said Sheffield Coal & Iron Company secured by mortgage on the property of said company in the sum of $750,000, and as plaintiff is informed and believes said mortgage was proposed by the defendant, and was made and executed by him as president of the said Sheffield Coal & Iron Company, and that the said mortgage and bonds have been ever sicne and now are outstanding and unpaid and constitute a lien on the property of said company.

65 EIGHTH.—That the said Stone as soon as possible after the discovery by him of the fraud and deceit and fraudulent concealment on the part of the defendant, practiced on him, as aforesaid, notified defendant that he elected to rescind his said subscription and offered to return all that he has received, to wit, the said certificates of stock, and demanded payment of the amount so, as aforesaid, paid by him, which said offer and demand were refused, and that he ever since has been and now is ready and willing to deliver up said certificates of stock, upon receiving payment of the amount paid by him, as aforesaid.

66 NINTH.—That by reason of the premises the plaintiff claims that he is entitled to receive from the defendant the sum so, as aforesaid, paid by said Stone, to wit, Five thousand ($5,000) dollars with interest.

TENTH.—That subsequent to the rescission, tender and demand aforesaid and before the commencement of this action said Elmer E. Stone duly assigned to this plaintiff his claim and cause of action against said defendant for and on account of the matters hereinbefore set forth.

WHEREFORE, the plaintiff demands judgment against the defendant for the sum of $55,000, with interest on the sum of $3,750 from July 2nd, 1902; on $5,000 from July 3rd, 1902; on $3,750 from July 20th, 1902; on $15,000 from August 30th, 1902; on $7,000 from September 2nd, 1902; on $7,500 from November 29th, 1902; on $5,000 from December 1st, 1902; on $4,500 from December 20th, 1902; and on $3,000 from December 22nd, 1902; and the costs of this action. 67

THEBON G. STRONG,
Plaintiff's Attorney,
49 Wall Street, 68
Borough of Manhattan,
City of New York.

CITY AND COUNTY OF NEW YORK, ss.:

JAMES SIM, being duly sworn, says that he is the plaintiff herein; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true. 69

JAMES SIM.

Sworn to before me this 25th day of March, 1907.

JOHN DAVIS,
Notary Public,
N. Y. Co.

70 **Order of Removal to United States Circuit Court.**

At a Special Term of the Supreme Court, held in and for the County of Kings, at the County Court House on the 15th day of October, 1907.

Present—Hon. JOSEPH ASPINALL, Justice.

JAMES SIM,
Plaintiff,

71

against

WILLIAM EDENBORN,
Defendant.

This cause coming on for hearing upon the application of the defendant herein for an order transferring this cause to the United States Circuit Court for the Second Circuit for the Eastern District of New York, and it appearing to the Court that the defendant has filed his petition for 72 such removal in due form of law and that the defendant has filed his bond, duly conditioned, with good and sufficient sureties as provided by law, and it appearing to the Court that this is a proper cause for removal to said Circuit Court;

Now, on motion of Martin W. Littleton, attorney for defendant, and Theron G. Strong, attorney for plaintiff, opposed, it is hereby

ORDERED AND ADJUDGED, that this cause be and it hereby is removed to the United States Circuit

Court for the Second Circuit, Eastern District of New York, and the Clerk is hereby directed to make up the record in said cause for transmission to said Court forthwith. 73

J. ASPINALL,
J. S. C.

Granted, Oct. 15, 1907.
CHARLES T. HARTZHEIM,
Clerk.

Demurrer. 74

CIRCUIT COURT OF THE UNITED STATES,

EASTERN DISTRICT OF NEW YORK.

JAMES SIM,
Plaintiff,

against

WILLIAM EDENBORN, 75
Defendant.

Demurrer.

Now comes the above named defendant and demurs to the complaint of the above named plaintiff, on the ground that it appears upon the face of the complaint:

1st. That the complaint does not state facts sufficient to constitute a cause of action.

76 2nd. That there is a defect of parties defendant, in the omission of August Mann and J. C. Walker named in said complaint as co-managers of the syndicate therein complained of.

3rd. That there is a defect of parties defendant, in the omission of the Sheffield Coal & Iron Company, the corporation mentioned and complained of in said complaint.

4th. That two causes of action have been improperly united, one being an alleged action in equity to rescind a contract, the other being an alleged action at law to recover damages for a tort.

77

MARTIN W. LITTLETON,
Attorney for Defendant,
60 Wall Street,
New York City.

I hereby certify that, in my opinion, the foregoing demurrer is well founded in point of law.

FREDERICK ALLIS,
Counsel for Defendant.

78

Opinion on Sustaining Demurrer. 79

UNITED STATES CIRCUIT COURT,

EASTERN DISTRICT OF NEW YORK.

JAMES SIM

vs.

WILLIAM EDENBORN.

THOMAS P. ALDER

vs.

WILLIAM EDENBORN.

August 6, 1908. 80

THEBON G. STRONG and THEBON R. STRONG, for plaintiffs.

MARTIN W. LITTLETON, for defendant; FREDK. ALLIS, of counsel.

81

CHATFIELD, J.

The plaintiff in each of the above actions entered into an agreement with the defendant, upon the 15th day of April, 1902, by which the plaintiff agreed to join a syndicate to purchase certain industrial stocks. The defendant, with two other individuals, were named in this agreement as managers of the syndicate, and the plaintiff Alder subsequently carried out his part of the contract, paid the sum of $10,136.08, upon the 17th day of

82 December, 1902, and about January 1, 1903, received a certificate for shares in one of the companies purchased. The plaintiff Sim is the assignee of a number of individuals who likewise entered into an agreement with the defendant with relation to the same syndicate transaction. Each of the assignors of the plaintiff Sim paid the amount of their subscriptions and received their stock, and it is now alleged on behalf of each plaintiff that Alder and Sim, and Sim's assignors, were induced by fraudulent representations of fact to make the agreement aforesaid. The plaintiffs further allege that the defendant
83 performed certain acts and did certain things in managing the syndicate, with the idea of continuing the deception of the plaintiffs and the other subscribers, and that the plaintiffs, as soon as they discovered the alleged fraud and deceit, on the part of the defendant, notified the defendant of an election to rescind their subscriptions, offered to return to the defendant the certificates of stock which they had received, and demanded payment of the amount advanced, which demand has been refused, and which tender of stock has been kept good.

84 The plaintiff in each of the actions therefore asks for judgment for the amount of the subscription, with interest from the date of payment, and the defendant in each case has demurred on three grounds, which must be considered. First, that there is a defect of parties, in that the co-syndicate managers are not made defendants; second, that the corporation whose stock was transferred is not made a party-defendant; and, third, that the plaintiff in each case has included in one cause of action the allegations of an action in equity to rescind a contract, and allegations in an action at law to recover damages for fraud and deceit.

The plaintiff in each case has met this demurrer by contending that his action is properly brought against the individual who made the false representations of fact, and who has perpetrated, as he alleges, the fraud upon him. He claims that he is entitled to rescind the contract and demand restitution at the hands of this person, and at the same time contends that his action is not in equity for rescission of the contract, but is an action at law, sounding in tort, based upon a rescission, for damages, equal in amount to the sum which the plaintiff in each case paid, tendering at the same time to that plaintiff the consideration which he received. 85 86

But one question involved in this idea need be considered, and that is, whether in the case of a syndicate, or the carrying out of a promotion agreement to form a syndicate, rescission can be relied upon, restitution offered, and the original payment demanded back, in an action at law against the individual who acted as promoter or agent.

The plaintiff could unquestionably have sued for damages for the fraud, if fraud existed. He could have brought various actions looking towards the disaffirmance of the agreement which he made upon going into the syndicate, if he could show a cause of action. None of these latter suits have been attempted. In any of them the other persons interested in the syndicate and the corporation with respect to which the syndicate was formed, would necessarily have been parties, but the plaintiff in each case contends that he is not suing upon a disaffirmance of his agreement with the others in the syndicate, but is suing in tort, upon a rescission of his original agreement to enter into a syndicate, which agreement was a personal contract with the defend- 87

88 ant. It is believed that the action cannot be maintained in its present form. Unless the plaintiffs rescind their entire agreement with all of the individuals and with the corporation, alleging that they have been deceived by misrepresentations of fact, in going into these agreements, the court does not see how the cause of action can be alleged as other than an action for damages, against the defendant as an individual, for his alleged misrepresentations of fact. In such an action for damages, if the plaintiff should demand the entire amount invested, the value of the securities obtained, if any, might be an offset
89 against the damage proved. So, too, the plaintiff, while alleging damage, might admit, as an offset, the stock obtained, and offer to the defendant an election to take the stock and pay the entire amount of damage, or to reimburse the plaintiff for the actual damage represented by the amount invested, less the value of the stock received, and whatever profits, if any, could be shown therefrom. But the precise action which has been brought, in form alleging a rescission of the contract, and demanding the return of the money invested, while perhaps in effect capable
90 of being considered as a demand for damages, less the offset of the stock received, is not so in terms, and is in form an action not maintainable as an action sounding in sort, and even, apparently, not an action at law.

The apparent fallacy of the plaintiff's position is contained in the statement in his brief that, "These are actions to recover moneys paid to the defendant pursuant to subscriptions made by plaintiffs to a syndicate promoted by defendant for acquiring certain properties, which said subscriptions were induced by fraud and deceit, practiced upon plaintiffs by defendant. Upon

the discovery of the fraud and deceit, plaintiffs rescinded their subscriptions, demanded repayment of the same, and tendered to defendant the shares of stock received from him as representing the amounts subscribed."

This paragraph shows that the plaintiff is stating an action involving the rescission of the agreement with the other parties to the syndicate, while apparently endeavoring to set forth a demand for damages for tort. The demurrers will be sustained, with leave to the plaintiffs to amend their complaints in accordance with this opinion, if they are so advised.

U. S. J.

Decision Sustaining Demurrer.

UNITED STATES CIRCUIT COURT,

EASTERN DISTRICT OF NEW YORK.

JAMES SIM,
Complainant,

AGAINST

WILLIAM EDENBORN,
Defendant.

The issues of law raised by the demurrer of the defendant to the complaint coming on to be heard, and held by the undersigned at the Court House in the County of Kings, State of New York, and

94 after hearing Martin W. Littleton, Esq., of Counsel for the defendant, in support of the demurrer, and Theron G. Strong, Esq., of Counsel for the complainant, in opposition thereto, and due deliberation having been had thereon, I decide and find as follows:

CONCLUSIONS OF LAW:

1. That the said complaint does not state facts sufficient to constitute a cause of action.

2. That there is a defect of parties in that the co-syndicate managers are not made defendants.

95 3. That the corporation whose stock was transferred is not made a party defendant.

4. That the complainant in each case has included in one cause of action the allegations of an action in equity to rescind a contract, and the allegations in an action at law to recover damages for fraud and deceit.

5. That the complainant is entitled to an interlocutory judgment sustaining said demurrer, with costs to be taxed by the Clerk, but with leave to the complainant to plead anew upon payment of
96 said costs within twenty days after due service of said judgment, with notice of entry thereof, upon the complainant's attorneys, and in default thereof defendant will be entitled to a final judgment dismissing the complaint herein with costs.

6. Judgment is hereby directed accordingly.

Dated, September 10th, 1908.

THOMAS I. CHATFIELD
U. S. D. J. Holding the
Circuit Court.

Judgment Sustaining Demurrer. 97

UNITED STATES CIRCUIT COURT,

EASTERN DISTRICT OF NEW YORK.

JAMES SIM,
Complainant,

AGAINST

WILLIAM EDENBORN,
Defendant. 98

The issues of law herein, raised by the demurrer of the defendant to complainant's complaint, having been regularly brought on for trial before Honorable Thomas I. Chatfield, District Judge holding the Court on the 28th day of December, 1907, at the Court House, Post Office Building, Borough of Brooklyn, City of New York, and the Court having heard Martin W. Littleton, Esq., of counsel for the defendant, in support of the demurrer, and Theron G. Strong, Esq., of counsel for the complainant, in opposition 99
thereto, and having, after due deliberation, made and filed its decision sustaining said demurrer and granting leave to the complainant to serve an amended complaint upon payment of costs within twenty (20) days, and directing that an interlocutory judgment be entered accordingly,

Now, on motion of Martin W. Littleton, Esq., of counsel for the defendant, it is

ORDERED AND ADJUDGED that the demurrer of the defendant to the complaint herein be, and it is hereby, sustained, with $13.50 disbursements as taxed; and it is

100 FURTHER ORDERED AND ADJUDGED that the complainant have leave to serve an amended complaint herein on payment of said disbursements, within twenty (20) days after due service of a copy of this judgment, with notice of entry thereof, upon the counsel for the complainant, and in default thereof that the defendant have final judgment dismissing the complaint herein, with costs.

Judgment entered the 24th day of September, 1908.

BY THE COURT.

B. LINCOLN BENEDICT,
Clerk.

101

Amended Complaint.

CIRCUIT COURT OF THE UNITED STATES.

EASTERN DISTRICT OF NEW YORK.

JAMES SIM,
Plaintiff,

102

AGAINST

WILLIAM EDENBORN,
Defendant.

The plaintiff complains of the defendant and alleges in this, his amended complaint, as follows:

FOR FIRST CAUSE OF ACTION.

FIRST.—On or about the 15th day of April, 1902, and until the first day of January, 1903, and subse-

quent thereto, defendant was engaged in promoting, forming and carrying out a syndicate agreement to purchase, develop and dispose of certain lands and properties, and for the purchase of the United States Iron Company of New Jersey then capitalized at $1,000,000 and its properties, and, to that end, prepared an agreement, dated April 15, 1902, and inserted therein as syndicate managers his own name, and the name of August Mann, his nephew, and J. C. Walker, an employee of a company with which defendant was then connected, and submitted the same to the subscribers thereto, to procure their subscriptions to the same. That said Edenborn personally controlled and managed the promotion and operation of said syndicate and the amounts subscribed thereto and was the largest subscriber thereto and the said Mann and Walker had little, if any, interest therein, and their action with respect thereto was directed and controlled by the said Edenborn. That under said agreement said syndicate managers were to have, and had the direction and management of the subject-matter of such syndicate, and each subscriber nominated and appointed the syndicate managers, his agents and attorneys, until the termination of said agreement and the defendant undertook to act under said agreement as one of such syndicate managers for the benefit and advantage of the subscribers thereto. 103 104 105

SECOND.—The defendant, being such promoter, a syndicate manager, and the agent and attorney of the subscribers, in exercising the power and authority conferred by said syndicate agreement occupied a relation of trust and confidence toward the subscribers to said syndicate, and it was his duty to make to said subscribers, full disclosure of all facts and circumstances which were within

106 defendant's knowledge, which said subscribers ought to have known in order to enable them to form an independent judgment and protect their interests and the plaintiff had and has a right to have unlimited trust and confidence in the defendant, and relied on and trusted him to the fullest extent, as he had a right to do, believing that he was worthy of trust and confidence.

THIRD.—That subsequent to the 15th day of April, 1902, but prior to the 20th day of July, 1902, defendant proposed to the plaintiff to become a subscriber to the said syndicate agreement, and,
107 as an inducement so to do, represented and stated to him that the enterprise was being organized in good faith, that each of the subscribers, according to their interests, had equal rights and stood on the same basis, that every man would put up his dollar against any other man's dollar, and that there were to be no special advantages to anyone, and that the syndicate proposed to purchase only valuable and paying properties, and that each subscription was to be payable in dollars and not in property, and that he had made a subscription for $500,000 payable in dollars and not in property.

108

FOURTH.—That as a further inducement to subscribe thereto defendant in and by said agreement represented and stated that an opportunity was afforded to acquire for a cash consideration the ownership, control and possession of the United States Iron Company of New Jersey, capitalized at $1,000,000 at par. That at or about the time defendant prepared the syndicate agreement and proposed to plaintiff to subscribe thereto, the defendant was the owner of about 5,365 out of a total of 9,250 shares of the stock of the said United States Iron Company, and with intent to

deceive and defraud the plaintiff and other subscribers had conceived the design and intention of selling and transferring his said stock to the said syndicate managers for cash, at par, and in so doing to relieve himself of said stock and to impose the same upon the persons whom he had induced to become subscribers to said agreement, and by fraud and deceit and intending to deceive and defraud the plaintiff herein, concealed from plaintiff and other subscribers the fact that the defendant owned a majority of the capital stock of the United States Iron Company, and controlled said company; that said stock had never yielded any dividends; that there was no market value for the same; that it was of little or no value, and that defendant intended to deliver and dispose of said stock to the said syndicate managers for cash subscribed by the subscribers to said agreement, instead of paying his said subscription in cash, which delivery and disposition was afterwards carried out by him.

FIFTH.—That, as plaintiff is informed and believes, defendant herein, intending to deceive and defraud plaintiff and other subscribers, conceived and concocted a scheme or plan, which he afterwards carried out and accomplished, whereby certain properties in which the said August Mann had an interest, should be transferred to said defendant's syndicate and imposed upon said subscribers, and that said Mann should receive therefor $1,000 and one thousand shares of stock in the Sheffield Coal & Iron Company hereinafter mentioned, and with intent to deceive and defraud the plaintiff and other subscribers to the said syndicate agreement, concealed from him and them the fact that the said properties in which said Mann was interested would be or had been purchased, and that said Mann was largely inter-

112 ested therein, and that the defendant and the said Mann had taken advantage of their position as syndicate managers, as aforesaid.

SIXTH.—That each and every of the said statements and representations made by the defendant were false and fraudulent and known by him to be so and were made with intent to deceive and defraud the plaintiff and other subscribers; that the said syndicate was not being organized by defendant in good faith; that each of the subscribers, according to their interests, did not have equal rights and did not stand upon the same
113 basis; that every man did not put up his dollar against every other man's dollar; that there were special advantages to the defendant and to the said August Mann; that the syndicate did not propose to purchase only valuable and paying properties; that the defendant's subscription was not paid in dollars but largely in stock of the United States Iron Company, and that he did not intend to pay the same in dollars in accordance with his subscription, but in stock of the United States Iron Company. That the plaintiff relied upon the truth of said statements and representations and believed the same to be true and did
114 not have any knowledge or information to the contrary until in or about the month of November, 1906, and so relying and believing subscribed to said syndicate agreement and paid the sum of $15,000 to the defendant at his request, as follows: $3,750 on July 20th, 1902; $5,250 on August 30th, 1902; $3,750 on November 29th, 1902; and $2,250 on December 20th, 1902; which said sums were received by defendant and the defendant delivered to the plaintiff and this plaintiff received therefor certificates of stock of the par value of One hundred ($100) Dollars each in the Sheffield Coal &

Iron Company, relying and believing as aforesaid, and would not have made his subscription and paid said sums nor received the certificates of stock aforesaid, if he had known that such statements, or any of them, were false or that the defendant having, as aforesaid, with intent to deceive and defraud the plaintiff and other subscribers, concealed from them that the defendant was the owner of a majority of the stock of the said United States Iron Company and controlled said company, and that said stock had never yielded any dividends; that there was no market value for the same; that it was of little or no value, and that defendant intended to deliver his stock in said United States Iron Company to said syndicate managers in part payment of his subscription, instead of paying the same in dollars, and that he did not intend to pay, and did not pay, in dollars the amount of said subscription, and that the defendant and the said August Mann had conceived and concocted a scheme or plan whereby said syndicate in which said Mann was interested should be transferred to said syndicate managers and thereby be imposed upon said subscribers, and that the said syndicate managers were to pay to the said syndicate in which said Mann was interested One thousand ($1,000) dollars in cash and One thousand (1,000) shares of stock in the said Sheffield Coal & Iron Company. 115 116 117

SEVENTH.—That having induced the plaintiff to subscribe to said syndicate agreement and the plaintiff having subscribed thereto, the defendant being one of said syndicate managers and with intent to deceive and defraud the plaintiff and other subscribers, and as the means of carrying out his fraudulent purposes and designs, as aforesaid, caused, as plaintiff is informed and believes,

the name of said United States Iron Company to be changed to the Sheffield Coal & Iron Company and the stock thereof to be increased, and called upon the plaintiff for the payment of his subscription, which plaintiff paid to the defendant, as aforesaid, and on or about the first day of January, 1903, defendant delivered to the plaintiff said certificates of stock in the said Sheffield Coal & Iron Company, which the plaintiff received, trusting and relying on defendant and having no knowledge or suspicion of fraud, deceit and fraudulent concealment by the defendant, as aforesaid, and the plaintiff has ever since held said certificates of stock and still holds the same.

EIGHTH.—That the plaintiff, as soon as possible after the discovery by him of fraud and deceit and fraudulent concealment on the part of the defendant practiced on him as aforesaid, notified said syndicate managers, including defendant, that he elected to rescind his subscription to said syndicate agreement and offered to return to defendant all that he had received from him, to wit, the said certificates of stock and demanded payment of the amount so, as aforesaid, paid by him to defendant, which said offer and demand were refused, and that he ever since has been and now is ready and willing to deliver up said certificates of stock upon receiving payment of the amount paid by him as aforesaid.

NINTH.—That no dividends have ever been earned or declared on the capital stock of said Sheffield Coal & Iron Co.; that said company has become insolvent and a receiver of its property has been appointed, who has taken possession thereof; that proceedings for foreclosure of mortgages on the property of said company have

been or are about to be begun, and the stock received by plaintiff has become and now is worthless, and by reason of the fraud and deceit by defendant aforesaid, plaintiff has lost and been damaged in the amount paid by him to the defendant. 121

TENTH.—That by reason of the premises the plaintiff claims that he is entitled to recover from defendant the sum so, as aforesaid, paid by him, to wit, fifteen thousand ($15,000) dollars, with interest on the sum of $3,750 from July 20, 1902; on $5,000 from August 30, 1902; on $5,750 from November 29, 1902, and on $2,250 from December 20, 1902. 122

FOR A SECOND CAUSE OF ACTION.

FIRST.—Plaintiff repeats and renews as a part hereof, as a cause of action in favor of Charles C. Cluff, the allegations of the first cause of action contained in Paragraphs First, Second, Third, Fourth and Fifth, with the same force and effect as if the same were again fully and at large set forth with the name of Charles C. Cluff inserted therein in place of plaintiff, and in addition therein alleges: 123

SECOND.—That each and every of the said statements and representations made by the defendant were false and fraudulent and known by him to be so, and were made with intent to deceive and defraud the said Cluff and other subscribers; that the said syndicate was not being organized by defendant in good faith; that each of the subscribers, according to their interests, did not have equal rights and did not stand upon the same basis; that every man did not put up his dollar

124 against every other man's dollar; that there were special advantages to the defendant and to the said August Mann; that the syndicate did not propose to purchase only valuable and paying properties; that the defendant's subscription was not paid in dollars, but largely in stock of the United States Iron Company, and that he did not intend to pay the same in dollars in accordance with his subscription, but in stock of the United States Iron Company. That the said Cluff relied upon the truth of said statements and representations and believed the same to be true and did not have any knowledge or information to the
125 contrary, until in or about the month of November, 1906, and so relying and believing subscribed to said syndicate agreement and paid the sum of $15,000 to the defendant at his request, as follows: $3,750 on July 20th, 1902; $5,250 on August 30, 1902; $3,750 on November 29, 1902, and $2,250 on December 20, 1902, which said sums were received by defendant, and the defendant delivered to the plaintiff and the plaintiff received therefor certificates of stock of the par value of One hundred ($100) dollars each in the Sheffield Coal & Iron Company relying and believing as
126 aforesaid, and would not have made his subscription and paid said sum nor received the certificates of stock aforesaid, if he had known that such statements, or any of them, were false, or that the defendant having, as aforesaid, with intent to defraud and deceive the said Cluff and other subscribers, concealed from them that the defendant was the owner of a majority of the stock of the said United States Iron Company and controlled said company, and that said stock had never yielded any dividends; that there was no market value for the same; that it was of little or no value, and that the defendant intended to

deliver his stock in said United States Iron Company to said syndicate managers in part payment of his subscription, instead of paying the same in dollars, and that he did not intend to pay in dollars the amount of said subscription, and that the defendant and the said August Mann had conceived and concocted a scheme or plan whereby said syndicate in which said Mann was interested should be transferred to said syndicate managers and thereby be imposed upon said subscribers, and that the said syndicate managers were to pay to the said syndicate in which said Mann was interested One thousand ($1,000) dollars in cash and one thousand (1,000) shares of stock in the Sheffield Coal & Iron Company. 127 128

THIRD.—That having induced the said Cluff to subscribe to said syndicate agreement and the said Cluff having subscribed thereto, the defendant being one of said syndicate managers and with intent to deceive and defraud the said Cluff and other subscribers, and as the means of carrying out his fraudulent purposes and designs, as aforesaid, caused, as plaintiff is informed and believes, the name of said United States Iron Company to be changed to the Sheffield Coal & Iron Company and the stock thereof to be increased, and called upon the said Cluff for the payment of his subscription, which said Cluff paid to the defendant, as aforesaid, and on or about the first day of January, 1903, defendant delivered to the said Cluff said certificates of stock in the said Sheffield Coal & Iron Company, which the said Cluff received, trusting and relying on defendant and having no knowledge or suspicion of the fraud, deceit and fraudulent concealment by the defendant, as aforesaid, and the said Cluff has ever 129

since held said certificates of stock until the assignment hereinafter mentioned.

FOURTH.—That the said Charles C. Cluff, as soon as possible after the discovery by him of fraud and deceit and fraudulent concealment on the part of defendant practiced on him as aforesaid, notified said syndicate managers, including defendant, that he elected to rescind his subscription to said syndicate agreement and offered to return to defendant all that he received from him, to wit, the said certificates of stock, and demanded payment of the amount so, as aforesaid, paid by him to defendant, which said offer and demand were refused, and that he ever since has been and now is ready and willing to deliver up said certificates of stock upon receiving payment of the amount paid by said Cluff, as aforesaid, with interest.

FIFTH.—That no dividends have ever been declared on the capital stock of said Sheffield Coal & Iron Co.; that said company has become insolvent and a receiver of its property has been appointed, who has taken possession thereof; that proceedings for foreclosure of mortgages on the property of said company have been, or are about to be begun, and the stock received by plaintiff has become and now is worthless, and by reason of the fraud and deceit by defendant aforesaid, plaintiff has lost and been damaged in the amount paid by him to the defendant.

SIXTH.—That subsequent to the rescission, tender and demand aforesaid and before the commencement of this action, said Charles C. Cluff duly assigned to this plaintiff his claim and said

cause of action against said defendant for and on account of the matters hereinbefore set forth. '33

SEVENTH.—That by reason of the premises the plaintiff claims that he is entitled to recover from defendant, the sum so, as aforesaid, paid by him, to wit, Fifteen thousand ($15,000) dollars, with interest on the sum of $3,750 from July 2nd, 1902; on $5,250 from August 30th, 1902; on $3,750 from November 29th, 1902, and on $2,250 from December 20th, 1902.

FOR A THIRD CAUSE OF ACTION.

'34

FIRST.—Plaintiff repeats and renews, as a part hereof, as a cause of action in favor of Thomas B. Coles, the allegations of the first cause of action contained in paragraphs, First, Second, Third, Fourth and Fifth, with the same force and effect as if the same were again fully and at large set forth with the name of Thomas B. Coles inserted therein in the place of the plaintiff, and in addition thereto alleges:

SECOND.—That each and every of the said statements and representations made by the defendant were false and fraudulent and known by him to be so and were made with intent to deceive and defraud the said Coles and other subscribers; that the said syndicate was not being organized by defendant in good faith; that each of the subscribers according to their interests, did not have equal rights and did not stand upon the same basis; that every man did not put up his dollar against every other man's dollar; that there were special advantages to the defendant and to the said August Mann, that the syndicate did not propose to purchase only valuable and paying properties; '35

136 that the defendant's subscription was not paid in dollars, but largely in stock of the United States Iron Company, and that he did not intend to pay the same in dollars in accordance with his subscription, but in stock of the United States Iron Company, that the said Coles relied upon the truth of said statements and representations and believed the same to be true and did not have any knowledge or information to the contrary until in or about the month of November, 1906, and so relying and believing subscribed to said syndicate agreement and paid the sum of $20,000 to the defendant at his request as follows: $5,000 on
137 July 3rd, 1902; $7,000 on September 2nd, 1902; $5,000 on July 3rd, 1902; $3,000 on December 22nd, 1902, which said sums were received by defendant and the defendant delivered to the plaintiff and the plaintiff received therefor certificates of stock of the par value of One hundred ($100) dollars each in the Sheffield Coal & Iron Company relying and believing as aforesaid and would not have made his subscription and paid said sum nor received the certificates of stock aforesaid if he had known that such statements, or any of them, were false or that the defendant, having,
138 as aforesaid with intent to deceive and defraud the said Coles and other subscribers concealed from them that the defendant was the owner of a majority of the stock of the said United States Iron Company and controlled said company and that said stock had never yielded any dividends; that there was no market value for the same; that it was of little or no value, and that defendant intended to deliver his stock in said United States Iron Company to said syndicate managers in part payment of his subscription, instead of paying the same in dollars, and that he did not intend

to pay in dollars the amount of said subscription and that the said defendant and the said August Mann had conceived and concocted a scheme or plan whereby said syndicate in which said Mann was interested should be transferred to said syndicate managers and thereby be imposed upon said subscribers, and that the said syndicate managers were to pay to the said syndicate in which said Mann was interested One thousand ($1,000) Dollars in cash and One thousand (1,000) shares of stock in the said Sheffield Coal & Iron Company. 139

THIRD.—That having induced the said Coles to subscribe to said syndicate agreement and the said Coles having subscribed thereto, the defendant being one of said syndicate managers and with intent to deceive and defraud the said Coles and other subscribers, and as the means of carrying out his fraudulent purposes and designs, as aforesaid, caused as plaintiff is informed and believes the name of said United States Iron Company to be changed to the Sheffield Coal & Iron Company and the stock thereof to be increased, and called upon the said Coles for the payment of his subscription, which said Coles paid to the defendant as aforesaid, and on or about the first day of January, 1903, defendant delivered to the said Coles said certificates of stock in the said Sheffield Coal & Iron Company, which the said Coles received, trusting and relying on defendant and having no knowledge or suspicion of the fraud, deceit and fraudulent concealment by the defendant, as aforesaid, and the said Coles has ever since held said certificates of stock until the assignment hereinafter mentioned. 140 141

FOURTH.—That said Thomas B. Coles as soon as possible after the discovery by him of fraud

and deceit and fraudulent concealment on the part of the defendant practiced on him as aforesaid, notified said syndicate managers, including defendant, that he elected to rescind his subscription to said syndicate agreement and offered to return to said defendant all that he received from him, to wit, the said certificates of stock and demanded payment of the amount so, as aforesaid paid by him to defendant, which said offer and demand were refused, and that he ever since has been and now is ready and willing to deliver up said certificates of stock upon receiving payment of the amount paid by said Coles, as aforesaid, with interest.

FIFTH.—That no dividends have ever been earned or declared on the capital stock of said Sheffield Coal & Iron Co.; that said Company has become insolvent and a receiver of its property has been appointed, who has taken possession thereof; that proceedings for foreclosure of mortgages on the property of said Company have been or are about to be begun, and the stock received by plaintiff has become and now is worthless, and by reason of the fraud and deceit by defendant aforesaid, plaintiff has lost and been damaged in the amount paid by him to the defendant.

SIXTH.—That subsequent to the rescission, tender and demand aforesaid and before the commencement of this action said Thomas B. Coles duly assigned to this plaintiff his claim and cause of action against said defendant for and on account of the matters hereinbefore set forth.

SEVENTH.—That by reason of the premises the plaintiff claims that he is entitled to recover from

defendant the sum so, as aforesaid, paid by said Coles, to wit, Twenty Thousand ($20,000) dollars, with interest on the sum of $5,000 from July 3rd, 1902; on $7,000 from September 2nd, 1902; on $5,000 from December 1st, 1902; and on $3,000 from December 22nd, 1902. 145

FOR A FOURTH CAUSE OF ACTION.

FIRST.—Plaintiff repeats and renews as a part hereof as a cause of action in favor of Elmer E. Stone the allegations of the first cause of action contained in Paragraphs First and Second thereof with the same force and effect as if the same were again fully and at large set forth with the name of Elmer E. Stone inserted therein in place of plaintiff, and in addition thereto alleges: 146

SECOND.—That on or about the 2nd day of June, 1902, defendant proposed to the said Stone to become a subscriber to said syndicate agreement and as an inducement so to do represented and stated to him that certain persons, to wit, Messrs. Keefe, Merriman, Baackes and Watson had subscribed various sums thereto, and that it was proposed to acquire certain ore properties in the south selected by Messrs. Walker and Dickman and to acquire a coal property selected by Mr. Harper, fuel expert of the Illinois Steel Company, and to erect two blast furnaces in the neighborhood of Sheffield, Alabama; that said ore properties were being purchased at cost to the present owners; that the proposition was purely a business matter, no bonds to be issued, nor any common stock, nor any special advantages to accrue to anyone and that he had made a subscription thereto of Five hundred thousand ($500,000) dollars, payable in dollars and requested that the 147

148 plaintiff authorize some one not a syndicate manager to subscribe his name and the amount of his subscription to said syndicate agreement.

THIRD.—That as a further inducement to subscribe thereto defendant in and by said agreement represented and stated to the subscribers thereto that an opportunity was afforded to acquire for a cash consideration the ownership, control and possession of the United States Iron Company of New Jersey at par, capitalized at $1,000,000. That at or about the time defendant prepared said syndicate agreement and proposed to the
149 said Stone to subscribe thereto, the defendant was the owner of about 5,365 out of a total of 9,250 shares of the stock of the said United States Iron Company, and with intent to deceive and defraud the said Stone and certain other subscribers had conceived the design and intention of selling and disposing of said stock to the said syndicate managers for cash, at par, and in so doing to relieve himself of said stock and to impose the same upon the persons whom he had induced to become subscribers to said agreement, and by fraud and deceit and intending to deceive and de-
150 fraud the said Stone, concealed from him and other subscribers the fact that the defendant owned a majority of the capital stock of the United States Iron Company and controlled said company; that said stock had never yielded any dividends; that there was no market value for the same; that it was of little or no value, and that defendant intended to deliver and dispose of said stock to the said syndicate managers for cash subscribed by the subscribers to said agreement, instead of paying his said subscription in cash, which delivery and disposition was afterwards carried out by him.

FOURTH.—That as plaintiff is informed and be- 151
lieves, defendant herein intending to deceive and defraud the said Stone and other subscribers, conceived and concocted a scheme or plan, which he afterwards carried out and accomplished whereby a certain syndicate agreement in which the said August Mann had an interest, should be transferred to said defendant's syndicate and imposed upon said subscribers, and that said syndicate in which the said Mann was interested should receive $1,000 and one thousand shares of stock in the Sheffield Coal & Iron Company hereinafter mentioned, and with intent to deceive and
defraud the said Stone and other subscribers to 152
said syndicate agreement concealed from him and them the fact that the said syndicate in which said Mann was interested, would be or had been purchased, and that said Mann was largely interested therein, and that the defendant and the said Mann had taken advantage of their position as syndicate managers, as aforesaid.

FIFTH.—That each and every of the said statements and representations made by the said defendant were false and fraudulent and known by him to be so, and were made with intent to de- 153
ceive and defraud the said Stone; that at least one of the persons named by defendant as having subscribed various sums to said syndicate agreement had not and never subscribed thereto; that it was not proposed to acquire certain ore properties in the south selected by Messrs. Walker and Dickman; that it was not proposed to acquire a coal property selected by Mr. Harper, fuel expert of the Illinois Steel Company, nor to erect two blast furnaces in the neighborhood of Sheffield, Alabama; that said ore properties were not being purchased at cost to the present owners;

154 that the proposition was not purely a business matter; that bonds were to be and were issued, and that there were special advantages to the defendant and to the said August Mann and that defendant did not intend to pay his subscription in dollars in accordance with his subscription, but largely in stock of the United States Iron Company; nor to pay the same in full but in stock of the United States Iron Company. That the said Stone relied upon the truth of said statements and representations and believed the same to be true and did not have any knowledge or information to the contrary until in or about the month
155 of November, 1906, and so relying thereon and believing authorized a subscription on his behalf in the sum of $5,000 to said agreement and paid to the defendant at his request said subscription in full which said sum was received by defendant and the defendant delivered to the plaintiff and the plaintiff received therefor, a certificate for fifty (50) shares of the capital stock of the Sheffield Coal & Iron Company, and would not have authorized said subscription on his behalf. and paid said sum nor received the certificate of stock aforesaid if he had known that any such
156 statements were false, or that the defendant having as aforesaid, with intent to deceive and defraud the said Stone had concealed from the said Stone the fact that the defendant was the owner of a majority of the stock of the said United States Iron Company and controlled said company; that said stock had never yielded any dividends; that there was no market value for the same; that it was of little or no value, and that defendant intended to sell the same to said syndicate managers and deliver his stock in said United States Iron Company in part payment of his subscription, instead of paying the same in dollars,

and that he did not intend to pay in dollars the amount of the said subscription, or that the defendant and the said August Mann had conceived and concocted a scheme or plan whereby said syndicate in which said Mann was interested, should be transferred to said syndicate managers and thereby be imposed upon said subscribers and that the said syndicate managers were to pay to the said syndicate in which said Mann was interested, $1,000 in cash and one thousand shares of stock in the said Sheffield Coal & Iron Company. 157

SIXTH.—That having induced the said Stone to authorize a subscription on his behalf to said syndicate agreement and a subscription thereto having been made on his behalf, the defendant being one of said syndicate managers and with intent to deceive and defraud the said Stone and other subscribers and as a means of carrying out his fraudulent purposes and designs as aforesaid, caused, as plaintiff is informed and believes, the name of said United States Iron Company to be changed to the Sheffield Coal & Iron Company and the stock thereof to be increased and called upon the said Stone for the payment of his subscription, which said Stone paid to the defendant as aforesaid and on or about the first day of January, 1903, defendant delivered to said Stone said certificates of stock in the said Sheffield Coal & Iron Company, which said Stone received, trusting and relying on defendant and having no knowledge or suspicion of the fraud, deceit and fraudulent concealment by the defendant, as aforesaid, and the said Stone has ever since held said certificates of stock until the assignment hereinafter mentioned. 158 159

160 SEVENTH.—That subsequently and on or about September 25th, 1903, the defendant, contrary to his statement and representation to the plaintiff and on which statement said Stone relied that no bonds were to be issued, notified said Stone of an issue of bonds by said Sheffield Coal & Iron Company secured by mortgage on the property of said company in the sum of $750,000, and as plaintiff is informed and believes said mortgage was proposed by the defendant, and was made and executed by him as president of the said Sheffield Coal & Iron Company, and that the said mortgage and bonds have been ever since and now
161 are outstanding and unpaid and constitute a lien on the property of said company.

EIGHTH.—That the said Stone as soon as possible after the discovery by him of the fraud and deceit and fraudulent concealment on the part of the defendant practiced on him, as aforesaid, notified defendant that he elected to rescind his said subscription and offered to return all that he has received, to wit, the said certificates of stock, and demanded payment of the amount, so, as aforesaid, paid by him to defendant which said
162 offer and demand were refused, and that he ever since has been and now is ready and willing to deliver up said certificates of stock, upon receiving payment of the amount paid by him, as aforesaid.

NINTH.—That no dividends have ever been earned or declared on the capital stock of said Sheffield Coal & Iron Co.; that said Company has become insolvent and a receiver of its properties has been appointed, who has taken possession thereof; that proceedings for foreclosure of mortgages on the property of said Company have been

or are about to be begun, and the stock received by plaintiff has become and now is worthless, and by the reason of the fraud and deceit by defendant aforesaid, plaintiff has lost and been damaged in the amount paid by him to the defendant. 163

TENTH.—That by reason of the premises the plaintiff claims that he is entitled to receive from the defendant the sum so, as aforesaid, paid by said Stone, to wit, five thousand ($5,000) dollars with interest.

ELEVENTH.—That subsequent to the rescission, tender and demand aforesaid and before the commencement of this action said Elmer E. Stone duly assigned to this plaintiff his claim and cause of action against said defendant for and on account of the matters hereinbefore set forth. 164

Wherefore, the plaintiff demands judgment against the defendant for the sum of $55,000, with interest on the sum of $3,750 from July 2nd, 1902; on $5,000 from July 3rd, 1902; on $3,750 from July 20th, 1902; on $15,000 from August 30th, 1902; on $7,000 from September 2nd, 1902; on $7,500 from November 29th, 1902; on $5,000 from December 1st, 1902; on $4,500 from December 20th, 1902; and on $3,000 from December 22nd, 1902; and the costs of this action. 165

STRONG, SMITH & STRONG,
Plaintiff's Attorneys,
49 Wall Street,
Borough of Manhattan,
City of New York.

166 CITY AND COUNTY OF NEW YORK, ss.:

James Sim, being duly sworn, says that he is the plaintiff herein; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

JAMES SIM.

Sworn to before me this 6th day of October, 1908.
J. NOYES SHAUGHNESSY,
Notary Public, Kings Co.,
167 Certificate Filed in New York Co.

Demurrer.

CIRCUIT COURT OF THE UNITED STATES,

EASTERN DISTRICT OF NEW YORK,

JAMES SIM,
Plaintiff,
168
AGAINST
WILLIAM EDENBORN,
Defendant.
} Demurrer.

Now comes the above named defendant and demurs to the amended complaint of the above named plaintiff, on the ground that it appears upon the face of the complaint:

1st. That the complaint does not state facts sufficient to constitute a cause of action.

2nd. That there is a defect of parties defendant, in the omission of August Mann and J. C. Walker named in said complaint as co-managers of the syndicate therein complained of. 169

3rd. That there is a defect of parties defendant, in the omission of the Sheffield Coal & Iron Company, the corporation mentioned and complained of in said complaint.

4th. That two causes of action have been improperly united, one being an alleged action in equity to rescind a contract, the other being an alleged action at law to recover damages for a tort. 170

MARTIN W. LITTLETON,
Attorney for Defendant,
2 Rector Street,
New York City.

I hereby certify that, in my opinion, the foregoing demurrer is well founded.

FREDERICK ALLIS,
Counsel for Defendant.

171

172 **Opinion on Overruling Demurrer.**

SIM v. EDENBORN	Opinion on Defendant's Demurrer. Dec. 24, 1908.
ALDER v. SAME.	

In its present form the complaint charges damage to the plaintiff growing out of false representations of facts by the defendant. The question is not whether a syndicate agreement was made in which all oral propositions were merged which could not be varied by parole testimony, but the issues stated is whether the defendant procured the signing of the agreement by fraud, for which an action will lie, if damage be proven.

174 Nor, again, does the Complaint in its present form charge failure to carry out the syndicate agreement. The syndicate managers and the Sheffield Company are therefore not necessary parties. The Complaint includes much that has to do with the conduct of the syndicate but those allegations are not to be regarded in considering whether a cause of action for deceit is stated, except in so far as they are charged to have been a part of the false purpose of the defendant, in making the original representations. The demurrer should be overruled, and defendant should answer.

THOMAS I. CHATFIELD,

Decision Overruling Demurrer.

175

At a Stated Term of the United States Circuit Court, Eastern District of New York, held at the Borough of Brooklyn, on the 5th day of January, 1909.

Present: Hon. Thomas I. Chatfield, District Judge, holding the Court.

James Sim,
Plaintiff,

176

against

William Edenborn,
Defendant.

The issues of law raised by the demurrer of the defendant to the complaint coming on to be heard, by the undersigned at Court House in the County of Kings, State of New York, and after hearing Frederick Allis, Esq., of counsel for the defendant in support of the demurrer, and Leonard B. Smith, of counsel for the plaintiff in opposition thereto, and due deliberation having been had thereon, I decide and find as follows:

177

1. That the said complaint states facts sufficient to constitute a cause of action.

2. That there is no defect of parties defendant.

3. That the complaint states a cause of action at common law based on the rescission of a contract alleged to have been procured by fraud.

It is therefore ordered that said demurrer be overruled and that [illegible]

178 judgment thereon, overruling the same, with disbursements, but with leave to the defendant to withdraw his demurrer and answer the complaint within forty days after service of a copy of such interlocutory judgment upon payment of said disbursements; and that in case of the failure of the defendant to serve and file an answer and pay said disbursements, that plaintiff have final judgment against the defendant for the relief demanded in the complaint, with costs.

THOMAS I. CHATFIELD,
U. S. District Judge,
179 holding the Court. J. C. C.

Judgment Overruling Demurrer.

UNITED STATES CIRCUIT COURT,

EASTERN DISTRICT OF NEW YORK.

JAMES SIM,
Plaintiff,

AGAINST

180

WILLIAM EDENBORN,
Defendant.

This cause having regularly come on for trial upon the issue of law arising upon the defendant's demurrer, to the amneded complaint herein, at a term of this court held by the Honorable Thomas I. Chatfield, District Judge, holding the court, and the parties having been heard and due deliberation had and said Judge having duly made and

filed his order in writing and directing interlocu- 181
tory judgment to be entered as hereinafter provided, and plaintiff's disbursements having been duly taxed at Fourteen and 40/100 ($14.40), now on motion of Strong, Smith & Strong, attorneys for the plaintiff, it is

ADJUDGED that the demurrer to the amended complaint be and the same hereby is overruled with $14.40/100 disbursements to the plaintiff; it is further

ADJUDGED that the defendant have leave to withdraw his demurrer and answer the complaint 182
within forty days after service of a copy hereof, upon payment of said disbursements; and that in case of the failure of the defendant to serve and file an answer and pay said disbursements within said time, that plaintiff have final judgment against the defendant for the relief demanded in the complaint, with costs.

Dated, January 5, 1909.

B. LINCOLN BENEDICT,
Clerk.

By the Court.

183

184 **Answer.**

UNITED STATES CIRCUIT COURT.

EASTERN DISTRICT OF NEW YORK.

JAMES SIM,
Plaintiff,

AGAINST

WILLIAM EDENBORN,
Defendant.

Answer.

185

The above named defendant, not waiving, but insisting, that the complaint herein does not state facts sufficient to constitute a cause of action, in the several particulars, specified in the demurrer herein, or otherwise, answering the complaint of the plaintiff herein, on information and belief:

IN ANSWER TO THE FIRST CAUSE OF ACTION:

I.—Denies each and every allegation contained in the first paragraph of said complaint, except
186 the allegation therein that the United States Iron Company of New Jersey, at the time there mentioned, was capitalized at one million dollars. And defendant further denies that, at the date mentioned in said paragraph of said complaint, or at any other time whatever, he was engaged in promoting, or forming, or carrying out, the syndicate agreement there set forth; but on the contrary thereof, defendant alleges that prior to the 15th of April, 1902, a number of persons, most of whom were, and for a long time prior thereto had been, engaged in the iron and steel business in various parts of the United States, and whose

names are attached to Exhibit A annexed hereto, 187
mutually agreed to form a syndicate, each member agreeing, with every other member of the syndicate, but not every syndicate member agreeing with defendant, as set forth in said complaint or otherwise, for the purchase of the capital stock of the United States Iron Company of New Jersey, of the par value of $1,000,000, and all its property, consisting of iron ore lands in Alabama and Tennessee, and for the purchase of certain other coal lands in the neighborhood of said iron properties, and also for the purchase and construction of blast furnaces in Sheffield, Alabama, and of forming a new corporation with a share capital 188
of $2,500,000, and of consolidating and operating said properties and purchases under the ownership, control and management of said new corporation; and to that end each of said syndicate members subscribed to a certain number of shares of stock in said new company; which said subscriptions are set opposite the names of said subscribers attached to Exhibit A annexed hereto, except that the subscription of defendant, Wm. Edenborn, there given as $475,000, was originally $500,000, defendant having surrendered $25,000 of his subscription to another subscriber after the execution of the subscription contract, Exhibit 189
A, and except that the original subscription of I. L. Ellwood to the amount of $350,000, was afterwards reduced to $300,000 by the surrender of $10,000 to Thomas P. Alder, and of $40,000 to August Mann; and to that end an agreement was prepared and executed and mutually delivered by said syndicate, dated April 15, 1902, a copy of which agreement is hereto annexed, marked Exhibit A, and made a part of this answer. And defendant further alleges that he never entered into any other agreement or contract with the members

190 of said syndicate, except as aforesaid; and that he never made any contract or agreement whatever, or made or received any proposition for an agreement, with plaintiff, as individual with individual, or otherwise than expressed in said contract, Exhibit A. And defendant specifically denies that he personally controlled or managed the promotion or operation of said syndicate, or the amount subscribed thereto, or that he inserted his own name, or the name of August Mann or of J. C. Walker as syndicate managers; but on the contrary thereof defendant alleges that said Mann, Walker and himself were voluntarily chosen by
191 the members of said syndicate to act as a board of managers thereof, and as their agents to carry out the purposes of said contract, Exhibit A, and not otherwise; and defendant specifically denies that said Mann and Walker had but little interest in said syndicate enterprise, or that their action with respect thereto was directed or controlled by defendant; but on the contrary thereof defendant alleges that said Mann was a subscriber to the amount of $140,000, and J. C. Walker and his brother W. R. Walker were subscribers to the amount of $185,000, and that said Mann and Walker, each, possessed and exercised the same
192 authority and power as managers of said syndicate as defendant himself, and that all the acts of said three managers were exercised by them jointly as a board of managers, and not otherwise. And defendant specifically denies that he submitted said contracts to the subscribers thereto, to procure their subscriptions to the same, as is alleged in said complaint or otherwise; but on the contrary thereof defendant alleges that the mutual agreement to subscribe was entered into before the execution of Exhibit A, by each subscriber contracting with each and every other subscriber, and that the contract was executed in its present

form, Exhibit A, by each and every subscriber contracting with said Edenborn, Mann and Walker as a board of syndicate managers, and not otherwise. And defendant further alleges that in and by said contract, Exhibit A, defendant undertook, and thereafter, acted, as one of said board of managers, to carry out the purposes of said contract, and did not undertake or act in any separate individual capacity for any other purpose. '93

II.—Denies that defendant, after his selection as one of the board of managers, as aforesaid, occupied a relation of trust and confidence toward the subscribers to said syndicate, by reason of his having been a promoter thereof, as is set forth in the second paragraph of said complaint; and defendant says he has no knowledge or information sufficient to form a belief as to whether the trust and confidence which plaintiff reposed in defendant was unlimited, nor as to the extent to which plaintiff relied on and trusted him; but defendant denies that plaintiff had any right to rely upon defendant when entering into said agreement to subscribe, before said syndicate agreement was executed, as aforesaid. '94

III.—Denies each and every allegation contained in the third paragraph of said complaint. Defendant specifically denies that he made any proposition, or offered any inducement, or had any dealings whatever with plaintiff, with reference to his becoming a subscriber to said syndicate agreement, as is alleged in said complaint or otherwise. Defendant further alleges that at the times there mentioned, and for ten or twelve years previously, plaintiff had been in the Illinois Coal & Iron Company, and was fully conversant with the steel and iron business of the country, '95

196 and with the iron property and business of United States Iron Company, and with the proposed organization of the Sheffield Coal & Iron Company by taking over the property of United States Iron Company and consolidating it with other larger properties, as aforesaid, and was well aware that defendant was a majority owner of the United States Iron Company stock, and the president thereof, and that defendant proposed to turn his said stock in exchange for stock of the Sheffield Coal & Iron Company, as was usual in such consolidations in the iron and steel business, as plaintiff well knew; and that relying upon and
197 induced by his own knowledge and information of the property and income of said United States Iron Company, and of the character of the property about to be purchased, and relying upon and induced by the names and subscriptions already given to said syndicate agreement, who included a large number of the most important and experienced iron and steel experts in the country; and not relying upon or induced by any other representation or consideration whatsoever on part of defendant, except the information given of the actual production, sales and prices of the United
198 States Iron Company, which were taken from its books—plaintiff made his subscription to the amount of $15,000. Defendant further says that the amount of his own subscription to the syndicate agreement, as will appear from the copy thereof marked Exhibit A, was designated by the figures 475,000 preceded by the dollar mark; and that he never made any representation to plaintiff personally upon the subject, except to refuse plaintiff's request, after said subscriptions were closed, for a portion of defendant's said allotment.

IV.—Denies each and every allegation contained in the fourth paragraph of said complaint, except the capitalization of the United States Iron Company at $1,000,000 par, and except also the allegation that defendant was the owner of about 5,365 out of a total of 9,250 shares of the capital stock of said Company. Defendant specifically denies that he ever proposed to plaintiff to subscribe to said syndicate agreement, or offered any inducements to him thereto, or intended to deceive or defraud the plaintiff or other subscribers, as is alleged in said complaint or otherwise. Defendant specifically denies that he concealed any of the matters set forth in said fourth paragraph of said complaint; but on the contrary thereof defendant alleges that for ten or twelve years previous to the events mentioned in the complaint, plaintiff had been engaged in and was thoroughly familiar with the iron and steel business of the country, and during all said times was well aware of the fact that defendant owned and controlled a majority of the capital stock of said United States Iron Company, as aforesaid. And defendant specifically denies that said stock had never yielded any dividends; but on the contrary thereof alleges that soon after defendant took hold of said United States Iron Company, to wit, December 31, 1901, it paid a dividend of 5% upon its capital stock of $1,000,000. Defendant specifically denies that the capital stock of said United States Iron Company had no market value at that time, or that it was of little or no value; but on the contrary thereof declares that said Company was rich and prosperous, that its iron properties were being actively worked at great profit, and that the market value of its stock was at that time not less than $70 per share of $100 par, and that it was intrinsically worth its

199 200 201

202 full face value. And defendant further alleges that the intention to sell, transfer and set over the United States Iron Company and its properties to the new corporation, about to be formed, was advertised in said syndicate agreement, and in all the negotiations leading up to it, and was well known to plaintiff and to all subscribers, as will more fully appear from the recitals in Exhibit A.

V.—Denies each and every allegation contained in the fifth paragraph of said complaint. And defendant specifically denies that any such syn-
203 dicate was ever formed, as is alleged in said paragraph; but on the contrary thereof defendant alleges that, in July, 1902, James Gayley, W. R. Walker and defendant, as the executive committee of the United States Iron Company, purchased additional ore lands owned by August Mann, at the agreed price of $101,000, and which were well worth said sum of $101,000; and that said Mann accepted in payment thereof $1,000 in cash and $100,000 in the capital stock of the new company, about to be formed for the purpose of taking over the property of said United States Iron Company and of acquiring other properties, as aforesaid;
204 and that said Mann then applied for $50,000 additional underwriting, but secured only $40,000, for which he paid cash. And defendant specifically denies that he concealed any of the facts of said transaction, or that there was anything to conceal.

VI.—Denies each and every allegation contained in the sixth paragraph of said complaint. Defendant specifically denies that any of the statements or representations made by the defendant were false or fraudulent, or known by

him to be so, or made with intent to deceive or 205
defraud the plaintiff or other subscribers. In reference to the allegation in said complaint, that defendant had agreed to pay his subscription in dollars, whereas he intended and did in fact pay for the same in United States Iron Company stock, and concealed said intention and fact from plaintiff, defendant alleges that the original purpose of the syndicate agreement was to take over all the stock of the United States Iron Company, to purchase other properties, and to consolidate them all in one stock, under the name of the Sheffield Coal & Iron Company, as will more fully appear from Exhibit A annexted hereto, and that 206
plaintiff had full knowledge of all the circumstances of the case; and that in consummating said changes, the price of said United States Iron Company stock was appraised by experts of the highest class at $70 per share, which was the original cost of defendant's shares, plus 6% interest, and when reported to the members of said syndicate, including those who were owners of United States Iron Company stock and those who were not, all being conversant with values of iron properties, said price of $70 per share was fixed as the true value of the United States Iron Company stock, and it was exchanged for stock 207
of the Sheffield Coal & Iron Company on that basis; that thereby said Sheffield Coal & Iron Company acquired the total outstanding stock of the United States Iron Company for $647,500, and took possession and began operation of its mines September 1, 1902; that so far as defendant's individual stock-holding interest was concerned, it was practically the same thing whether he paid his subscription in cash, and received cash for his United States Iron stock, or whether he turned said stock over to the Sheffield Coal &

Iron Company at the valuation fixed; his subscription was for $475,000 of Sheffield Coal & Iron Company, which he paid for with 5,365 shares of United States Iron stock and $99,455 in cash. Defendant specifically denies that plaintiff was not informed of the truth of the transactions therein set forth until November 1906; but on the contrary thereof defendant alleges that plaintiff had full knowledge and information of all the circumstances prior to his becoming a subscriber, as aforesaid. Defendant specifically denies that plaintiff was moved or induced to become a subscriber to said syndicate agreement upon any of the grounds set forth in said complaint; but on the contrary thereof defendant alleges that plaintiff was not induced and did not enter said syndicate until some time after said agreement, Exhibit A, was executed and promulgated, and that when plaintiff saw the names of the subscribers to said agreement, containing some of the most prominent and experienced experts in the coal and iron business and values, as will more fully appear from the names attached to said Exhibit A, he, said plaintiff, being himself a man of long experience and knowledge in said business, induced by said subscriptions and said names, and by his own knowledge and information on the subject, and relying upon the same, and not otherwise, and not induced by or relying upon anything said or done by defendant individually, applied to said syndicate managers and obtained an allotment of 150 shares of Sheffield Coal & Iron stock from said Company, being the new corporation organized in pursuance of said syndicate agreement, Exhibit A, as aforesaid, and accordingly plaintiff paid to the Sheffield Coal & Iron Company the subscription price therefor, as set forth in the said complaint, amounting to

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$15,000 in all, and received from said Sheffield Coal & Iron Company a certificate for 150 shares of stock; but defendant specifically denies that said sum, or any part thereof, was paid to the defendant, or at his request, or that said 150 shares of stock, or the certificate therefor, was received from the defendant. And defendant alleges that it was especially provided in said syndicate agreement, as will appear from the seventh paragraph thereof annexed hereto, that all payments for subscriptions were made payable to said Sheffield Coal & Iron Company, through any bank, firm, person, or corporation, other than defendant and his co-syndicate managers themselves; and said subscription from plaintiff was called by said managers jointly, and was paid to said Sheffield Coal & Iron Company through some bank or other financial medium, other than themselves; and defendant denies that he directed any of said proceedings, or notified the plaintiff thereof personally; but on the contrary thereof alleges that said direction and notices, wherever made, were made by said syndicate managers jointly in pursuance of said agreement, Exhibit A. Defendant specifically denies that he would not have become a subscriber to said syndicate, or have paid said subscription and acquired said stock, if he had known the truth of said matters; but on the contrary thereof defendant alleges that plaintiff was well aware of all the circumstances, as aforesaid, and that he relied as an inducement for making said subscription and purchase, not upon representations therein set forth, nor upon the truth thereof, but upon his own knowledge and information and influenced by the names and prestige of the subscribers already in said syndicate agreement, and not otherwise.

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214 VII.—Denies each and every allegation contained in the seventh paragraph of said complaint, except the allegation therein that plaintiff holds and has held said certificate of stock. Defendant further alleges that it was the original intention of the syndicate members to organize an entirely new company for the purchase and consolidation of the United States Iron Company's and other properties, but their object was accomplished by changing the name of United States Iron Company to Sheffield Coal & Iron Company, and increasing the capital from $1,000,000 to $2,500,000, thereby saving a considerable sum in
215 reduced New Jersey stock tax. Defendant specifically denies that he individually delivered to plaintiff the certificate of stock in the Sheffield Coal & Iron Company; but on the contrary thereof alleges that said certificate was delivered to plaintiff by said Sheffield Coal & Iron Company through the joint agency of said syndicate managers, and not otherwise.

VIII.—Denies that plaintiff has rescinded his subscription or said syndicate agreement, as set forth in the eighth paragraph of said complaint,
216 or otherwise, or that he has notified said syndicate managers to that effect, or that he has offered to return to said Sheffield Coal & Iron Company the said shares of stock which he received from it as aforesaid, or has offered to return said shares to said syndicate managers for said Company, or that he has demanded payment of said Sheffield Coal & Iron Company of the subscription price paid to them as aforesaid, or has demanded the same from said syndicate managers; but on the contrary thereof defendant says that plaintiff has given said notices and made all said demands to defendant personally and individually, and not otherwise.

IX.—Denies that the Sheffield Coal & Iron Company is insolvent, or that its stock is worthless, or that plaintiff has been damaged to the amount paid by him for said stock, as is alleged in the said complaint or otherwise. Defendant alleges in this respect that the original property of the United States Iron Company was and is very rich and profitable; that its iron mines were actively operated from September to December, 1902, for 1903 (none in 1904), 1905, 1906 and to September, 1907, and the ore produced if sold at market prices ruling in that district during that period, would have made a net profit of $464,500, and approximately 90% of the ore is still in the ground; these properties were turned over to the Sheffield Coal & Iron Company for $647,500. And defendant alleges that the above figures stood upon the Company's books and records during all the time mentioned in said complaint, and plaintiff had access to the same as stockholder of record. Defendant further alleges that said Sheffield Coal & Iron Company is now the owner entitled to all the benefit of said income bearing property; that said Sheffield Coal & Iron Company, in addition to said United States Iron property, invested the balance of its capital, amounting to about $1,500,000, in the purchase and construction of two blast furnaces and adjoining coal properties in Sheffield, Alabama. That at the commencement of operations the Company lost heavily through the deficiency of its blast furnaces, but not through any defect or loss on account of its iron or coal properties, and the Company was obliged to make heavy repairs and reconstruction of its plant at great expense, and late in 1904, through a serious error in judgment of its president, the Company suffered a heavy loss by selling large quantities of pig iron

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220 for future delivery, and at the outbreak of the panic in the fall of 1907 the Company was forced into the hands of receivers. But defendant further alleges that steps were immediately taken for a reorganization of the Company based upon the real value of its properties, and the owners of 19,925 shares, out of 25,000, paid a 20% additional assessment, and the Company is in the process of reorganization, expecting soon to resume profitable operations; that the most experienced coal and iron men, and the largest holders in said corporation, have shown their confidence in the real value of this property by carrying on said
221 reorganization. Naturally, there has been no active market for the stock while it has been under receivership; but such sales as have taken place have been at a price above par. And defendant alleges that said stock, instead of being utterly worthless, as alleged in said complaint, is of the reasonable and true value at the present time of more than $100 a share.

X.—Denies the allegation contained in the tenth paragraph of the complaint.

222 In Answer to the Second Cause of Action:

XI.—Defendant repeats and renews each and every denial, and realleges each and every allegation contained in paragraphs I, II, IV and V of this answer with the same force and effect as if the same were again set forth with the name of Charles C. Cluff inserted as plaintiff.

XII.—Denies each and every allegation contained in the third paragraph of the first cause of action in said complaint. Defendant specifically denies that he made any proposition or of-

fered any inducements or had any dealings what- 223
ever with said Cluff, with reference to his becoming a subscriber to said syndicate agreement, as is alleged in said complaint or otherwise. Defendant further alleges that at the times there mentioned, and for ten or twelve years previously, said Cluff had been in the American Steel & Wire Company, of which defendant was Vice-President, and in other coal and iron companies, and was fully conversant with the steel and iron business of the country, and with the iron property and business of United States Iron Company, and with the proposed organization of the Sheffield Coal & Iron Company by taking over the 224
property of United States Iron Company and consolidating it with other larger properties, as aforesaid, and was well aware that defendant was a majority owner of the United States Iron Company stock, and the president thereof, and that defendant proposed to turn his said stock in exchange for stock of the Sheffield Coal & Iron Company, as was usual in such consolidations in the iron and steel business, as said Cluff well knew; and that relying upon and induced by his own knowledge and information of the property and income of said United States Iron Com-
pany, and of the character of the property about 225
to be purchased, and relying upon and induced by the names and subscriptions already given to said syndicate agreement, who included a large number of the most important and experienced iron and steel experts in the country; and not relying upon or induced by any other representation or consideration whatsoever on part of defendant, except the information given of the actual production, sales and prices of the United States Iron Company, which were taken from its books—plaintiff made his subscription to the

226 amount of $20,000. Defendant further says that the amount of his own subscription to the syndicate agreement, as will appear from the copy thereof marked Exhibit A, was designated by the figures 475,000, preceded by the dollar mark; and that he never made any representation to plaintiff personally upon the subject, except to refuse plaintiff's request, after said subscriptions were closed, for a portion of defendant's said allotment.

XIII.—Denies each and every allegation contained on the second paragraph of the third
227 cause of action of said complaint. Defendant specifically denies that any of the statements or representations made by the defendant were false or fraudulent, or known by him to be so, or made with intent to deceive or defraud the said Cluff or other subscribers. In reference to the allegation in said complaint, that defendant had agreed to pay his subscription in dollars, whereas he intended and did in fact pay for the same in United States Iron Company stock, and concealed said intention and fact from said Cluff, defendant alleges that the original purpose of the syndicate
228 agreement was to take over all the stock of the United States Iron Company, to purchase other properties, and to consolidate them all in one stock, under the name of the Sheffield Coal & Iron Company, as will more fully appear from Exhibit A annexed hereto, and that said Cluff had full knowledge of all the circumstances of the case; and that in consummating said changes, the price of said United States Iron Company stock was appraised by experts of the highest class at $70 per share, which was the original cost of defendant's shares, plus 6% interest, and when reported to the members of said syndicate, includ-

ing those who were owners of United States Iron Company stock and those who were not, all being conversant with values of iron properties, said price of $70 per share was fixed as the true value of the United States Iron Company stock, and it was exchanged for stock of the Sheffield Coal & Iron Company on that basis; that thereby said Sheffield Coal & Iron Company acquired the total outstanding stock of the United States Iron Company for $647,500, and took possession and began operation of its mines September 1, 1902; that so far as defendant's individual stockholding interest was concerned, it was practically the same thing whether he paid his subscription in cash, and received cash for his United States Iron stock, or whether he turned said stock over to the Sheffield Coal & Iron Company at the valuation fixed; his subscription was for $475,000 of Sheffield Coal & Iron Company, which he paid for with 5,365 shares of United States Iron stock and $99,455 in cash. Defendant specifically denies that said Cluff was not informed of the truth of the transactions therein set forth until November, 1906; but on the contrary thereof defendant alleges that said Cluff had full knowledge and information of all the circumstances prior to his becoming a subscriber, as aforesaid. Defendant specifically denies that said Cluff was moved or induced to become a subscriber to said syndicate until some time after said agreement, Exhibit A, was executed and promulgated, and that when said Cluff saw the names of the subscribers to said agreement, containing some of the most prominent and experienced experts in the coal and iron business and values, as will more fully appear from the names attached to said Exhibit A, he, said plaintiff, being himself a man of long experience and knowledge in said business, induced

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232 by said subscriptions and said names, and by his own knowledge and information on the subject, and relying upon the same, and not otherwise, and not induced by or relying upon anything said or done by defendant individually, applied to said syndicate managers and obtained an allotment of 150 shares of Sheffield Coal & Iron stock from said Company, being the new corporation organized in pursuance of said syndicate agreement, Exhibit A, as aforesaid, and accordingly said Cluff paid to the Sheffield Coal & Iron Company the subscription price therefor, as set forth in the said complaint, amounting to $15,000 in all, and
233 received from said Sheffield Coal & Iron Company a certificate for 150 shares of stock; but defendant specifically denies that said sum, or any part thereof, was paid to the defendant, or at his request, or that said 150 shares of stock, or the certificate therefor, was received from said defendant. And defendant alleges that it was especially provided in said syndicate agreement, as will appear from the seventh paragraph thereof annexed hereto, that all payments for subscriptions were made payable to said Sheffield Coal & Iron Company, through any bank, firm, person, or corporation, other than defendant and his co-syn-
234 dicate managers themselves; and said subscription from said Cluff was called by said managers jointly, and was paid to said Sheffield Coal & Iron Company through some bank or other financial medium, other than themselves; and defendant denies that he directed any of said proceedings, or notified said Cluff thereof personally; but on the contrary thereof alleges that said direction and notices, wherever made, were made by said syndicate managers jointly in pursuance of said agreement, Exhibit A. Defendant specifically denies that he would not have become a subscriber to said syndicate, or have paid said subscription

and acquired said stock, if he had known the truth of said matters; but on the contrary thereof defendant alleges that said Cluff was well aware of all the circumstances, as aforesaid, and that he relied as an inducement for making said subscription and purchase, not upon representations therein set forth, nor upon the truth thereof, but upon his own knowledge and information and influenced by the names and prestige of the subscribers already in said syndicate agreement, and not otherwise. 235

XIV.—Denies each and every allegation contained in the third paragraph of the second cause of action of said complaint, except the allegation that said Cluff received and has held said certificate of stock. Defendant further alleges that it was the original intention of the syndicate members to organize an entirely new company for the purchase and consolidation of the United States Iron Company's and other properties, but their object was accomplished by changing the name of United States Iron Company to Sheffield Coal & Iron Company, and increasing the capital from $1,000,000 to $2,500,00, thereby saving a considerable sum in reduced New Jersey stock tax. Defendant specifically denies that he individually delivered to said Cluff the certificate of stock in the Sheffield Coal & Iron Company; but on the contrary thereof alleges that said certificate was delivered to him by said Sheffield Coal & Iron Company through the joint agency of said syndicate managers, and not otherwise. 236 237

XV.—Denies that said Cluff has rescinded his subscription or said syndicate agreement, as set forth in the fourth paragraph of the second cause of action of said complaint, or otherwise, or that

he has notified said syndicate managers to that effect, or that he has offered to return to said Sheffield Coal & Iron Company the said shares of stock which he received from it as aforesaid, or has offered to return said shares to said syndicate managers for said Company, or that he has demanded payment of said Sheffield Coal & Iron Company of the subscription price paid to them as aforesaid, or has demanded the same from said syndicate managers; but on the contrary thereof defendant says that said Cluff has given said notices and made all said demands to defendant personally and individually, and not otherwsie.

XVI.—Denies that the Sheffield Coal & Iron Company is insolvent, or that its stock is worthless, or that said Cluff has been damaged to the amount paid by him for said stock, as is alleged in the fifth paragraph of the second cause of action of said complaint, or otherwise. Defendant alleges in this respect that the original property of the United States Iron Company was and is very rich and profitable; that its iron mines were actively operated from September to December, 1902, for 1903 (none in 1904), 1905, 1906 and to September, 1907, and the ore produced if sold at market prices ruling in that district during that period, would have made a net profit of $464,500, and approximately 90% of the ore is still in the ground; these properties were turned over to the Sheffield Coal & Iron Company for $647,500. And defendant alleges that the above figures stood upon the Company's books and records during all the time mentioned in said complaint, and said Cluff had access to the same as stockholder of record. Defendant further alleges that said Sheffield Coal & Iron Company is now the owner en-

titled to all the benefit of said income bearing property; that said Sheffield Coal & Iron Company, in addition to said United States Iron property, invested the balance of its capital, amounting to about $1,500,000, in the purchase and construction of two blast furnaces and adjoining coal properties in Sheffield, Alabama. That at the commencement of operations the Company lost heavily through the deficiency of its blast furnaces, but not through any defect or loss on account of its iron or coal properties, and the Company was obliged to make heavy repairs and reconstruction of its plant at great expense, and late in 1904, through a serious error in judgment of its president, the Company suffered a heavy loss by selling large quantities of pig iron for future delivery, and at the outbreak of the panic in the fall of 1907 the Company was forced into the hands of receivers. But defendant further alleges that steps were immediately taken for a reorganization of the Company based upon the real value of its properties, and the owners of 19,925 shares, out of 25,000, paid a 20% additional assessment, and the Company is in the process of reorganization, expecting soon to resume profitable operations; that the most experienced coal and iron men, and the largest holders in said corporation, have shown their confidence in the real value of this property by carrying on said reorganization. Naturally, there has been no active market for the stock while it has been under receivership; but such sales as have taken place have been at a price above par. And defendant alleges that said stock, instead of being utterly worthless, as alleged in said complaint, is of the reasonable and true value at the present time of more than $100 a share.

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244 XVII.—Denies that he has any knowledge or information as to any of the allegations contained in the sixth paragraph of the second cause of action of said complaint.

XVIII.—Denies the allegations contained in the seventh paragraph of the second cause of action of said complaint.

In Answer to the Third Cause of Action:

XIX.—Defendant repeats and renews each and every denial, and realleges each and every allega-
245 tion, contained in paragraphs I, II, IV and V of this answer with the same force and effect as if the same were again set forth at large with the name of Thomas B. Coles inserted as plaintiff.

XX.—Denies each and every allegation contained in the third paragraph of the first cause of action in said complaint. Defendant specifically denies that he made any proposition or offered any inducements or had any dealings whatever with the said Coles, with reference to his becoming a subscriber to said syndicate agreement, as is alleged in said complaint or other-
246 wise. Defendant further alleges that at the times there mentioned, and for ten or twelve years previously, said Coles had been in the American Steel & Wire Company, of which defendant was Vice-President, and in other coal and iron companies, and was fully conversant with the steel and iron business of the country, and with the iron property and business of United States Iron Company, and with the proposed organization of the Sheffield Coal & Iron Company by taking over the property of the United States Iron Company and consolidating it with other larger properties, as aforesaid, and was well aware that

defendant was a majority owner of the United States Iron Company stock, and the president thereof, and that defendant proposed to turn his said stock in exchange for stock of the Sheffield Coal & Iron Company, as was usual in such consolidations in the iron and steel business, as said Coles well knew; and that relying upon and induced by his own knowledge and information of the property and income of said United States Iron Company, and of the character of the property about to be purchased, and relying upon and induced by the names and subscriptions already given to said syndicate agreement, who included a large number of the most important and experienced iron and steel experts in the country, and not relying upon or induced by any other representation or consideration whatsoever on part of defendant, except the information given of the actual production, sales and prices of the United States Iron Company, which were taken from its books—said Coles made his subscription to the amount of $20,000. Defendant further says that the amount of his own subscription to the syndicate agreement, as will appear from the copy thereof marked Exhibit A, was designated by the figures 475,000, preceded by the dollar mark; and that he never made any representations to plaintiff personally upon the subject. 247 248 249

XXI.—Denies each and every allegation contained in the second paragraph of the third cause of action of said complaint. Defendant specifically denies that any of the statements or representations made by the defendant were false or fraudulent, or known by him to be so, or made with intent to deceive or defraud said Coles or other subscribers. In reference to the allegation in said complaint, that defendant had agreed to

250 pay his subscription in dollars, whereas he intended and did in fact pay for the same in United States Iron Company stock, and concealed said intention and fact from said Coles, defendant alleges that the original purpose of the syndicate agreement was to take over all the stock of the United States Iron Company, to purchase other properties, and to consolidate them all in one stock, under the name of the Sheffield Coal & Iron Company, as will more fully appear from Exhibit A annexed hereto, and that said Coles had full knowledge of all the circumstances of the case; and that in consummating
251 said changes, the price of said United States Iron Company stock was appraised by experts of the highest class at $70 per share, which was the original cost of defendant's shares, plus 6 per cent. interest, and when reported to the members of said syndicate, including those who were owners of United States Iron Company stock and those who were not, all being conversant with values of iron properties, said price of $70 per share was fixed as the true value of the United States Iron Company stock, and it was exchanged for stock of the Sheffield Coal & Iron Company
252 on that basis; that thereby said Sheffield Coal & Iron Company acquired the total outstanding stock of the United States Iron Company for $647,500, and took possession and began operation of its mines September 1, 1902; that so far as defendant's individual stockholding interest was concerned, it was practically the same thing whether he paid his subscription in cash, and received cash for his United States Iron stock, or whether he turned said stock over to the Sheffield Coal & Iron Company at the valuation fixed; his subscription was for $475,000 of Sheffield Coal & Iron Company, which he paid for with 5,365

shares of United States Iron stock and $99,455 in cash. Defendant specifically denies that said Coles was not informed of the truth of the transactions therein set forth until November, 1906 but on the contrary thereof defendant alleges that said Coles had full knowledge and information of all the circumstances prior to his becoming a subscriber, as aforesaid. Defendant specifically denies that said Coles was moved or induced to become a subscriber to said syndicate until some time after said agreement, Exhibit A, was executed and promulgated, and that when said Coles saw the names of the subscribers to said agreement, containing some of the most prominent and experienced experts in the coal and iron business and values, as will more fully appear from the names attached to said Exhibit A, he, said plaintiff, being himself a man of long experience and knowledge in said business, induced by said subscriptions and said names, and by his own knowledge and information on the subject, and relying upon the same, and not otherwise, and not induced by or relying upon anything said or done by defendant individually, applied to said syndicate managers and obtained an allotment of 200 shares of Sheffield Coal & Iron stock from said Company, being the new corporation organized in pursuance of said syndicate agreement, Exhibit A, as aforesaid, and accordingly said Coles paid to the Sheffield Coal & Iron Company the subscription price therefor, as set forth in the said complaint, amounting to $20,000 in all, and received from said Sheffield Coal & Iron Company a certificate for 200 shares of stock; but defendant specifically denies that said sum, or any part thereof, was paid to the defendant or at his request, or that said 200 shares of stock, or the certificate therefor, were received from said defendant.

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256 And defendant alleges that it was specially provided in said syndicate agreement, as will appear from the seventh paragraph thereof annexed hereto, that all payments for subscriptions were made payable to said Sheffield Coal & Iron Company, through any bank, firm, person, or corporation, other than defendant and his co-syndicate managers themselves; and said subscription from said Coles was called by said managers jointly, and was paid to said Sheffield Coal & Iron Company through some bank or other financial medium, other than themselves; and defendant denies that he directed any of said proceedings,
257 or notified said Coles thereof personally; but on the contrary thereof alleges that said direction and notices, wherever made, were made by said syndicate managers jointly in pursuance of said agreement, Exhibit A. Defendant specifically denies that he would not have become a subscriber to said syndicate, or have paid said subscription and acquired said stock, if he had known the truth of said matters; but on the contrary thereof defendant alleges that said Coles was well aware of all the circumstances, as aforesaid, and that he relied as an inducement for making said sub-
258 scription and purchase, not upon representations therein set forth, nor upon the truth thereof, but upon his own knowledge and information and influenced by the names and prestige of the subscribers already in said syndicate agreement, and not otherwise.

XXII.—Denies each and every allegation contained in the third paragraph of the third cause of action of said complaint, except the allegation that said Coles received and has held said certificate of stock. Defendant further alleges that it was the original intention of the syndicate mem-

bers to organize an entirely new company for the purchase and consolidation of the United States Iron Company's and other properties, but their object was accomplished by changing the name of United States Iron Company to Sheffield Coal & Iron Company, and increasing the capital from $1,000,000 to $2,500,000 thereby saving a considerable sum in reduced New Jersey stock tax. Defendant specifically denies that he individually delivered to said Coles the certificate of stock in the Sheffield Coal & Iron Company; but on the contrary thereof alleges that said certificate was delivered to him by said Sheffield Coal & Iron Company through the joint agency of said syndicate managers, and not otherwise. 259 260

XXIII.—Denies that said Coles has rescinded his subscription or said syndicate agreement, as set forth in the fourth paragraph of the third cause of action of said complaint, or otherwise, or that he has notified said syndicate managers to that effect, or that he has offered to return to said Sheffield Coal & Iron Company the said shares of stock which he received from it as aforesaid, or has offered to return said shares to said syndicate managers for said company, or that he has demanded payment of said Sheffield Coal & Iron Company of the subscription price paid to them as aforesaid, or has demanded the same from said syndicate managers; but on the contrary thereof defendant says that said Coles has given said notices and made all said demands to defendant personally and individually, and not otherwise. 261

XXIV.—Denies that the Sheffield Coal & Iron Company is insolvent, or that its stock is worthless, or that said Coles has been damaged to the

262 amount paid by him for said stock, as is alleged in the fifth paragraph of the third cause of action of said complaint, or otherwise. Defendant alleges in this respect that the original property of the United States Iron Company was and is very rich and profitable; that its iron mines were actively operated from September to December, 1902, for 1903, (none in 1904), 1905, 1906 and to September, 1907, and the ore produced if sold at market prices ruling in that district during that period, would have made a net profit of $464,500, and approximately 90% of the ore is still in the ground; these properties were turned over to the
263 Sheffield Coal & Iron Company for $647,500. And defendant alleges that the above figures stood upon the Company's books and records during all the time mentioned in said complaint, and said Coles had access to the same as stockholder of record. Defendant further alleges that said Sheffield Coal & Iron Company is now the owner entitled to all the benefit of said income bearing property; that said Sheffield Coal & Iron Company, in addition to said United States Iron property, invested the balance of its capital, amounting to about $1,500,000, in the purchase and construction of two blast furnaces and adjoining coal properties in Shef-
264 field, Alabama. That at the commencement of operations the Company lost heavily through the deficiency of its blast furnaces, but not through any defect or loss on account of its iron or coal properties, and the Company was obliged to make heavy repairs and reconstruction of its plant at great expense, and late in 1904, through a serious error in judgment of its president, the Company suffered a heavy loss by selling large quantities of pig iron for future delivery, and at the outbreak of the panic in the fall of 1907 the Company was forced

into the hands of receivers. But defendant further alleges that steps were immediately taken for a reorganization of the Company based upon the real value of its properties, and the owners of 19,925 shares, out of 25,000, paid a 20% additional assessment, and the Company is in the process of reorganization, expecting soon to resume profitable operations; that the most experienced coal and iron men, and the largest holders in said corporation, have shown their confidence in the real value of this property by carrying on said reorganization. Naturally, there has been no active market for the stock while it has been under receivership; but such sales as have taken place have been at a price above par. And defendant alleges that said stock, instead of being utterly worthless, as alleged in said complaint, is of the reasonable and true value at the present time of more than $100 a share. 265 266

XXV.—Denies that he has any knowledge or information as to any of the allegations contained in the sixth paragraph of the third cause of action of said complaint.

XXVI.—Denies the allegations contained in the seventh paragraph of the third cause of action of said complaint. 267

In answer to the fourth cause of action:

XXVII.—Defendant repeats and renews each and every denial, and realleges each and every allegation contained in paragraphs I and II of this answer with the same force and effect as if the same were again set forth with the name of Elmer E. Stone inserted as plaintiff.

268 XXVIII.—Denies each and every allegation contained in the second paragraph of the fourth cause of action in said complaint. Further answering said paragraph, defendant alleges that said Stone for more than ten years prior to the time spoken of had been engaged in the iron and steel business, and in the United States Iron Company, of which defendant was president, and was well acquainted with the property of United States Iron Company, and with the proposition to expand the Company and consolidate with other properties, to form a blast furnace company, under the ownership of the Sheffield
269 Coal & Iron Company, with blast furnaces in Sheffield, and the iron property of the United States Iron Company furnishing the ore, as already explained; that said Stone was often in defendant's office, as President of United States Iron Company; defendant advised and corresponded with him, giving statistics of output and business of United States Iron Company, and expressing confidence in the future new consolidated company, but offered no persuasion or inducement to join the syndicate; and that relying upon and induced by his own knowledge and
270 information upon the subject, and uninfluenced by any representations or inducements of defendant, said Stone applied to the syndicate managers aforesaid for $10,000 underwriting, on or about July 26, 1902, and received an allotment of $5,000 about December 3, 1902. With reference to the charge oncerning the said defendant's subscription being payable in dollars, there was no representation made by defendant upon the subject whatever; the amount of his subscription, as will appear from the copy thereof marked Exhibit A, was designated by the figures 475,-

000, preceded by the dollar mark; and that de- 271
fendant never made any representation, or offered any inducements, or had any dealings with said Stone upon the subject of said syndicate, except to refuse said Stone's request for $10,000 underwriting, and to cut it down to $5,000, as a member of said syndicate managers.

XXIX.—Denies each and every allegation contained in the third paragraph of the fourth cause of action of said complaint, except the capitalization of the United States Iron Company at $1,000,000 par, and except also the allegation that defendant was the owner of about 5,365 out of a 272
total of 9,250 shares of the capital stock of said Company. Defendant specifically denies that he ever proposed to said Stone to subscribe to said syndicate agreement, or offered any inducements to him thereto, or intended to deceive or defraud said Stone or other subscribers, as is alleged in said complaint or otherwise. Defendant specifically denies that he concealed any of the matters set forth in said fourth paragraph of said complaint; but on the contrary thereof defendant alleges that for ten or twelve years previous to the events mentioned in the complaint, said Stone had 273
been engaged in and was thoroughly familiar with the iron and steel business of the country, and during all said times was well aware of the fact that defendant owned and controlled a majority of the capital stock of said United States Iron Company, as aforesaid. And defendant specifically denies that said stock had never yielded any dividends; but on the contrary thereof alleges that soon after defendant took hold of said United States Iron Company, to wit, December 31, 1901, it paid a dividend of 5% upon its capital stock of $1,000,000. Defendant specifically denies that

the capital stock of said United States Iron Company had no market value at that time, or that it was of little or no value; but on the contrary thereof, declares that said Company was rich and prosperous, that its iron properties were being actively worked at great profit, and that the market value of its stock was at that time not less than $70 per share of $100 par, and that it was intrinsically worth its full face value. And defendant further alleges that the intention to sell, transfer and set over the United States Iron Company and its properties to the new corporation, about to be formed, was advertised in said syndicate agreement, and in all the negotiations leading up to it, and was well known to said Stone and to all subscribers, as will more fully appear from the recitals in Exhibit A.

XXX.—Denies each and every allegation contained in the fifth paragraph of the fourth cause of action of said complaint. Defendant specifically denies that any of the statements or representations made by the defendant were false or fraudulent, or known by him to be so, or made with intent to deceive or defraud said Stone or other subscribers. In reference to the allegation in said complaint, that defendant had agreed to pay his subscription in dollars, whereas he intended and did in fact pay for the same in United States Iron Company stock, and concealed said intention and fact from said Stone, defendant alleges that the original purpose of the syndicate agreement was to take over all the stock of the United States Iron Company, to purchase other properties, and to consolidate them all in one stock, under the name of the Sheffield Coal & Iron Company, as will more fully appear from Exhibit A annexed hereto, and that said Stone had

full knowledge of all the circumstances of the case; and that in consummating said changes, the price of said United States Iron Company stock was appraised by experts of the highest class at $70 per share, which was the original cost of defendant's shares, plus 6% interest, and when reported to the members of said syndicate, including those who were owners of United States Iron Company stock and those who were not, all being conversant with values of iron properties, said price of $70 per share was fixed as the true value of the United States Iron Company stock, and it was exchanged for stock of the Sheffield Coal & Iron Company on that basis; that thereby said Sheffield Coal & Iron Company acquired the total outstanding stock of the United States Iron Company for $647,500, and took possession and began operation of its mines September 1, 1902; that so far as defendant's individual stock-holding interest was concerned, it was practically the same thing whether he paid his subscription in cash, and received cash for his United States Iron stock, or whether he turned said stock over to the Sheffield Coal & Iron Company at the valuation fixed; his subscription was for $475,000 of Sheffield Coal & Iron Company, which he paid for with 5,365 shares of United States Iron stock and $99,455 in cash. Defendant specifically denies that said Stone was not informed of the truth of the transactions therein set forth until November, 1906; but on the contrary thereof defendant alleges that said Stone had full knowledge and information of all the circumstances prior to his becoming a subscriber, as aforesaid. Defendant specifically denies that said Stone was moved or induced to become a subscriber to said syndicate agreement upon any of the grounds set forth in said complaint; but on

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280 the contrary thereof defendant alleges that said Stone was not induced and did not enter said syndicate until some time after said agreement, Exhibit A, was executed and promulgated, and that when said Stone saw the names of the subscribers to said agreement, containing some of the most prominent and experienced experts in the coal and iron business and values, as will more fully appear from the names attached to said Exhibit A, he, said Stone, being himself a man of long experience and knowledge in said business, induced by said subscriptions and said names, and by his own knowledge and information on the sub-
281 ject, and relying upon the same, and not otherwise, and not induced by or relying upon anything said or done by defendant individually, applied to said syndicate managers and obtained an allotment of 50 shares of Sheffield Coal & Iron stock from said Company, being the new corporation organized in pursuance of said syndicate agreement, Exhibit A, as aforesaid, and accordingly said Stone paid to the Sheffield Coal & Iron Company the subscription price therefor, as set forth in the said complaint, amounting to $5,000 in all, and received from said Sheffield Coal & Iron Com-
282 pany a certificate for 50 shares of stock; but defendant specifically denies that said sum or any part thereof, was paid to the defendant, or at his request, or that said 50 shares of stock, or the certificate therefor, was received from said defendant. And defendant alleges that it was especially provided in said syndicate agreement, as will appear from the seventh paragraph thereof annexed hereto, that all payments for subscriptions were made payable to said Sheffield Coal & Iron Company, through any bank, firm, person, or corporation, other than defendant and his co-syndicate managers them-

selves; and said subscription from said Stone 283
was called by said managers jointly, and was paid to said Sheffield Coal & Iron Company through some bank or other financial medium, other than themselves; and defendant denies that he directed any of said proceedings, or notified said Stone thereof personally; but on the contrary thereof alleges that said direction and notices, wherever made, were made by said syndicate managers jointly in pursuance of said agreement, Exhibit A. Defendant specifically denies that he would not have become a subscriber to said syndicate, or have paid said subscription and acquired said stock, if he had known the truth of said matters; 284
but on the contrary thereof defendant alleges that said Stone was well aware of all the circumstances, as aforesaid, and that he relied as an inducement for making said subscription and purchase, not upon representations therein set forth, nor upon the truth thereof, but upon his own knowledge and information and influenced by the names and prestige of the subscribers already in said syndicate agreement, and not otherwise.

XXXI.—Denies each and every allegation contained in the sixth paragraph of the fourth cause of action of said complaint, except the allegation 285
therein that said Stone received and held the certificate for 50 shares of Sheffield Coal & Iron stock. Defendant further alleges that it was the original intention of the syndicate members to organize an entirely new company for the purchase and consolidation of the United States Iron Company's and other properties, but their object was accomplished by changing the name of United States Iron Company to Sheffield Coal & Iron Company, and increasing the capital from $1,000,000 to $2,500,000 thereby saving a considerable sum in reduced New Jersey stock tax. Defen-

dant specifically denies that he individually delivered to said Stone the certificate of stock in the Sheffield Coal & Iron Company; but on the contrary thereof alleges that said certificate was delivered to said Stone by said Sheffield Coal & Iron Company through the joint agency of said syndicate managers, and not otherwise; and defendant specifically denies that said subscription price was paid by said Stone to defendant, or that said shares were received by him from defendant personally and individually, but on the contrary thereof alleges that said money was paid to the Sheffield Coal & Iron Company, and said shares were delivered by said Company to said Stone.

XXXII.—Denies each and every allegation contained in the seventh paragraph of the fourth cause of action of said complaint; but on the contrary thereof defendant alleges that when said Sheffield Coal & Iron Company purchased said furnace property there was a mortgage of $750,000 on said furnace property alone, which said company purchased and put in the treasury, and afterwards, owing to unexpected losses and expenses in business, said company resold it; no promise had been made regarding them, but near the end of 1903, it became necessary to raise money in this way, and said transaction had nothing to do with representations or inducements held out to said Stone and other subscribers.

XXXIII.—Denies that said Stone ever rescinded his subscription or said syndicate agreement, as set forth in the eighth paragraph of said complaint, or otherwise, or that he has notified said syndicate managers to that effect, or that he has offered to return to said Sheffield Coal & Iron Company the said shares of stock which he re-

ceived from it as aforesaid, or has offered to return said shares to said syndicate managers for said Company, or that he has demanded payment of said Sheffield Coal & Iron Company of the subscription price paid to them as aforesaid, or has demanded the same from said syndicate managers; but on the contrary thereof defendant says that said Stone has given said notices and made all said demands to defendant personally and individually, and not otherwise. 289

XXXIV.—Denies that the Sheffield Coal & Iron Company is insolvent, or that its stock is worthless, or that said Stone has been damaged to the amount paid by him for said stock, as is alleged in the ninth paragraph of the second cause of action of said complaint, or otherwise. Defendant alleges in this respect that the original property of the United States Iron Company was and is very rich and profitable; that its iron mines were actively operated from September to December, 1902, for 1903, (none in 1904), 1905, 1906, and to September, 1907, and the ore produced if sold at market prices ruling in that district during that period, would have made a net profit of $464,500, and approximately 90% of the ore is still in the ground; these properties were turned over to the Sheffield Coal & Iron Company for $647,500. And defendant alleges that the above figures stood upon the Company's books and records during all the time mentioned in said complaint, and said Stone had access to the same as stockholder of record. Defendant further alleges that said Sheffield Coal & Iron Company is now the owner entitled to all the benefit of said income bearing property; that said Sheffield Coal & Iron Company, in addition to said United States Iron property, invested the balance of its 290 291

292 capital, amounting to about $1,500,000, in the purchase and construction of two blast furnaces and adjoining coal properties in Sheffield, Alabama. That at the commencement of operations the Company lost heavily through the deficiency of its blast furnaces, but not through any defect or loss on account of its iron or coal properties, and the Company was obliged to make heavy repairs and reconstruction of its plant at great expense, and late in 1904, through a serious error in judgment of its president, the Company suffered a heavy loss by selling large quantities of pig iron for future delivery, and at the outbreak of
293 the panic in the fall of 1907 the Company was forced into the hands of receivers. But defendant further alleges that steps were immediately taken for a reorganization of the Company based upon the real value of its properties, and the owners of 19,925 shares, out of 25,000, paid a 20% additional assessment, and the Company is in the process of reorganization, expecting soon to resume profitable operations; that the most experienced coal and iron men, and the largest holders in said corporation, have shown their confidence in the real value of this property by carrying
294 on said reorganization. Naturally, there has been no active market for the stock while it has been under receivership; but such sales as have taken place have been at a price above par. And defendant alleges that said stock, instead of being utterly worthless, as alleged in said complaint, is of the reasonable and true value at the present time of more than $100 a share.

XXXV.—Denies the allegations contained in the tenth paragraph of the fourth cause of action of said complaint.

XXXVI.—Denies that he has any knowledge or information sufficient to form a belief as to any of the allegations contained in the eleventh paragraph of the fourth cause of action in said complaint. 295

Wherefore, defendant demands judgment against the plaintiff, dismissing the complaint herein, and for the costs and disbursements of this action.

Martin W. Littleton,
Defendant's Attorney,
2 Rector Street, 296
Borough of Manhattan,
New York City.

State of New York,)
County of New York,) ss.:

Martin W. Littleton, being duly sworn, says: That he is the attorney of the defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true. Deponent further says that the reason why this verification is made by deponent, and not by defendant, is that said defendant is a resident of Louisiana, and is not within said county of New York, wherein dependent resides and has his office; and that the grounds of his belief, and the sources of his information, as to all matters therein not stated upon his knowledge, are the syndicate agreement upon which this action is based, and numerous letters, and papers communicated by 297

298 defendant, and several personal interviews with defendant, with whom deponent has been almost continuously in communication since the action was commenced.

MARTIN W. LITTLETON.

Sworn to before me this 19th day of February, 1909.

WM. T. RAINEY,
Notary Public, Kings Co.,
Certificate filed in New York Co.

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(Exhibit A)

AGREEMENT, dated April 15th, 1902, by and between August Mann, Wm. Edenborn, and J. C. Walker (hereinafter called the "Syndicate Managers"), parties of the first part, and the subscribers hereto, severally, parties of the second part, of whom each is hereinafter termed a subscriber, and all of whom, together with the said parties of the first part, constitute the Syndicate.

WHEREAS, an opportunity is afforded to acquire for a cash consideration the ownership, control and possession of the United States Iron Company, of New Jersey, at par, said company being capitalized at One Million Dollars ($1,000,000) and being the owner of valuable iron ore mines in operation and ore properties located in the States of Alabama and Tennessee aggregating a tonnage sufficient to insure an ore supply for two or more blast furnaces for a long period; and a further opportunity presenting itself to acquire by cash purchase a valuable coal property situated on the border line between the States of Kentucky and Virginia, which property being owned by various parties can be secured at reasonable prices; also other property; and

WHEREAS, by the erection of two modern blast furnaces for the production of foundry and other irons, which furnaces to be advantageously located as to receipt of raw material and shipment of iron produced by the use of iron ores and the use of coke produced from the coal lands referred to, would prove profitable to the subscribers hereto; and

WHEREAS, the sum of One Million Dollars ($1,000,000) should be provided to secure all, or near-

ly all, the stock of the United States Iron Company, the sum of Two Hundred and Fifty Thousand Dollars ($250,000) to purchase coal lands and to erect 200 coke ovens; the sum of One Million Dollars ($1,000,000) to erect two modern blast furnaces; and the sum of Two Hundred and Fifty Thousand Dollars ($250,000) for other contingencies; or a total of Two Million, Five Hundred Thousand Dollars ($2,500,000).

WHEREAS, it is deemed advisable and desirable that a syndicate be formed which shall furnish and supply said sums, aggregating Two Million, Five Hundred Thousand Dollars ($2,500,000) for the purposes above mentioned, and that the parties of the first part should be and become the Syndicate Managers and as such managers have the management of said Syndicate and all the moneys and properties acquired;

NOW, THEREFORE, this agreement witnesseth, that in consideration of the premises and mutual promises herein contained, the parties hereto agree, and the subscribers severally agree with each other and with the Syndicate Managers, as follows:

FIRST.—The parties hereto hereby form a Syndicate to purchase, acquire, use, develop and dispose of the lands and properties above mentioned, or so much or such part thereof as, in the judgment and opinion of the said Syndicate Managers, is deemed advisable and proper.

SECOND.—Each subscriber shall set opposite his name the amount of his subscription to the said Syndicate. The Syndicate Managers may be subscribers to the Syndicate and to the extent of such subscription or reservation by them shall be lia-

ble hereunder and shall be entitled in all respects 307
to the same rights and benefits as other subscribers.

THIRD.—From time to time, upon calls made by the Syndicate Managers and within such periods and in such manner as shall be specified in such calls, the subscribers, severally and respectively, agree to and will pay such sums in cash as shall be called by said Syndicate Managers, the aggregate not exceeding their respective subscriptions hereunder.

FOURTH.—The failure of any subscriber to per- 308
form any of his undertakings hereunder shall not affect or release any other subscriber. In case of the failure of any subscriber to perform any of his undertakings hereunder, the Syndicate Managers may allow other persons to subscribe for and acquire the interest in said Syndicate of the subscriber so failing, and at their sole and exclusive option shall have the right to exclude such failing subscriber from further interest of participation in the Syndicate, and to forfeit all payments made by him hereunder, and to hold such failing subscriber liable for any damages which may have been caused the Syndicate by such 309
failure.

FIFTH.—Said Syndicate Managers shall issue, or cause to be issued to the subscribers, receipts in respect to payments made hereunder, or certificates of interest in said Syndicate, of such tenor and form as they may deem suitable. Such certificates of interest and all rights and obligations hereunder of the respective subscribers may be made transferable only in such manner and on such terms and conditions as the said Syndicate Managers may prescribe.

310 SIXTH.—The Syndicate Managers hereunder shall have the direction and management of the subject matter of said Syndicate, and each subscriber nominates and appoints the Syndicate Managers, his agents and attorneys irrevocable, until the termination of this agreement to exercise all the rights of the subscribers in and to the properties proposed to be acquired, and to enter into and execute any and all arrangements or agreements deemed by the Syndicate Managers expedient or necessary to carry out and perform the object and purpose of this Syndicate, and each subscriber hereby ratifies and assents to any ac-
311 tion of the Syndicate Managers taken under this agreement and agrees to perform his undertaking hereunder from time to time, promptly as called and required by the Syndicate Managers.

SEVENTH.—The Syndicate Managers may in their sole discretion, direct and cause the subscribers hereto to make payments of the amounts of their respective subscriptions from time to time as the same are called, to any bank, firm, person or corporation other than themselves and to accept and receive for such payments the receipt or certificate of interest to be issued by any
312 such bank, firm, person or corporation receiving such payments under the direction and nomination of such Syndicate Managers.

EIGHTH.—The Syndicate Managers shall take the title to any of the lands or properties to be acquired by the Syndicate in such form and in the names of such persons, firms or corporations as in their judgment and opinion shall be deemed proper and advisable; and such persons, firms or corporations in whose name or names title to said lands or properties, or any part thereof, is taken,

shall convey, transfer and deliver the same in such manner and at such times as the said Syndicate Managers shall determine and direct. 313

NINTH.—Should the Syndicate Managers in the exercise of their absolute power and discretion hereunder, sell, convey or transfer any of the money or properties acquired by the Syndicate for either cash, bonds, stock or securities, each of the subscribers hereto shall be entitled to receive, on the termination of this agreement and the dissolution of this Syndicate his *pro rata* share thereof. And, if the money and property acquired by the Syndicate, or any part thereof, is 314
caused to be sold and conveyed to any corporation which may be formed for the purpose of acquiring the same from the Syndicate, and issuing in payment therefor its stocks, bonds or other form of securities, then and in that event the Syndicate Managers shall have and retain the exclusive right and power to supervise and superintend each and all of the steps and proceedings in respect of the organization of any such corporation becoming the purchaser and owner of said money and properties of said Syndicate, and to that end shall have the right and power to designate and appoint agents, attorneys and 315
counsel, to be employed in and by such organization and shall have also the power to name and have duly elected and qualified the first permanent board of directors and officers of such purchasing corporation, as well as the active managers thereof.

TENTH.—Such Syndicate Managers shall have authority from time to time, and at any time, to incur such expenses as they may deem proper for carrying out, or endeavoring to carry out this

agreement, or in doing any act or thing which they may deem to be in the interest of the Syndicate; and, at their sole and absolute discretion finally to fix and pay all compensations of depositaries, brokers, agents, counsel or others.

ELEVENTH.—As the subscriptions hereto may exceed the total amount required, the right is hereby expressly reserved to the Syndicate Managers, in their discretion, to ballot and allow to the subscribers hereto only so much or such part of the subscriptions made as they may determine, and the allotment and allowance when made by said Syndicate Managers shall be conclusive on all parties; and each subscription shall be limited to the amount so alloted and allowed by the Syndicate Managers.

TWELFTH.—The enumeration of specific powers in this agreement shall not be construed as in any way limiting any general powers intended to be conferred upon, or reserved to the Syndicate Managers, it being intended to reserve to them (and hereby they are expressly reserved and conferred upon them, in addition to the specific and general powers recited herein) all other general and specific powers which, from time to time, they may deem necessary in order fully and effectively to carry out the purposes of this agreement and of this Syndicate, whether or not such purposes are herein expressed; and to make and establish and require adherence to any such rules and regulations concerning the conduct of said Syndicate and all matters pertaining thereto as to the said Syndicate Managers shall seem just and reasonable.

THIRTEENTH.—The Syndicate Managers shall not be liable for any error of judgment or for any mistake of law or fact; nor shall they be liable for any act or omission while endeavoring, in good faith, to carry out the purposes hereunder according to their judgment and nothing herein contained, or otherwise, shall constitute the parties hereto partners, or shall render any of the subscribers liable to contribute more than his several and proportionate amounts as herein provided, or shall prevent any of the parties from contracting with each other with reference to any of their respective interests.

FOURTEENTH.—Each and all the rights, liabilities, acts, undertakings, powers and authorities of the Syndicate Managers under this agreement, and in pursuance thereof shall control and become operative and in force by the act of assent of any two thereof, and each and all matters and things to be done or performed in and under this agreement, and in and by said Syndicate, and in and by all depositaries, agents, trustees and all other persons, firms and corporations, connected therewith, shall be done and performed and carried out on the request, judgment and direction of the said Syndicate Managers, when done by the act or assent of any two thereof.

FIFTEENTH.—The death or disability of any one of the said Syndicate Managers shall not dissolve or otherwise affect said Syndicate, nor change or affect the Syndicate Managers; the survivor or survivors of said Syndicate Managers shall, in such event, substitute for such deceased or disabled member one of the subscribers to this Syndicate, and the Syndicate Managers as so then constituted shall succeed to all the rights and pow-

ers of said Syndicate Managers, and proceed to carry out and consummate the purposes of this agreement and the object of said Syndicate.

SIXTEENTH.—This agreement shall remain in force and the Syndicate formed shall remain in existence, until declared terminated and dissolved by the Syndicate Managers, but the existence and continuation thereof shall not extend beyond January 1st, 1903.

SEVENTEENTH.—This agreement shall bind and is for the benefit of the subscribers hereto and their respective executors and administrators and assigns; but no assignment hereunder shall be valid unless consented to in writing by the Syndicate Managers.

EIGHTEENTH.—Each subscriber shall set opposite his subscription an address to which notices, calls or other communications shall be sent, and in case the call or other communication addressed to the subscriber at the address so given, and either left as such address or mailed, it shall be deemed actually given to such subscriber, and shall be deemed sufficient for all purposes herein. If any subscriber shall fail to furnish his address to the Syndicate Managers, he shall not be entitled to any notices of calls or offers or any other notices hereunder, and he shall be deemed to assent to any action of said Syndicate Managers.

IN WITNESS WHEREOF, the parties of the first part have hereunto affixed their signatures, and the parties of the second part, at various dates, have affixed their subscriptions hereto; it being understood that for the sake of convenience this agreement may be subscribed in several parts,

and copies in like force and effect as if all subscriptions were on one part or copy thereof. 325

Witnesses:

WILLIAM EDENBORN,
AUGUST MANN,
J. C. WALKER,
Syndicate Managers.

NAME.	AMOUNT OF SUBSCRIPTION. (In Dollars)	ADDRESS.

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328 BLAST FURNACE SYNDICATE.

Subscribers.	*Amount.*	*Address.*
Wm. Edenborn	$475,000	1709 Empire Bldg., New York City.
W. R. Walker	165,000	1812 Empire Bldg., New York City.
August Mann	140,000	Supt. Rankin Wire Mills, Braddock, Pa.
James Gayley	100,000	1901 Empire Bldg., New York City.
Alfred Clifford	50,000	Security Bldg., St. Louis, Mo.
I. L. Elwood	300,000	De Kalb, Illinois.
Frank Baackes	25,000	c/o A. S. & W. Co., Rookery Bldg., Chicago, Ill.
E. C. Lott	50,000	c/o A. S. & W. Co., Rookery Bldg., Chicago, Ill.
329 D. A. Merriman	20,000	c/o A. S. & W. Co., Rookery Bldg., Chicago, Ill.
F. L. Watson	10,000	c/o A. S. & W. Co., Rookery Bldg., Chicago, Ill.
C. L. Miller	15,000	c/o A. S. & W. Co., Tradesmen's Bldg., Pittsburgh, Pa.
Wallace H. Rowe	25,000	Pittsburgh Steel Co., Ferguson Bldg., Pittsburgh.
T. B. Cowles	20,000	c/o A. S. & W. Co., Empire Bldg., New York City.
E. H. Martin	5,000	c/o Carnegie Steel Co., Pittsburgh, Pa.
G. H. Timmerman	25,000	Pres., St. Louis Iron & Machine Wks., St. Louis, Mo.
330 Leo Rassieur	12,000	406 Market St., do.
W. M. Douglas	50,000	Allentown, Pa.
John H. Wrenn & Co.	25,000	Rookery Bldg., Chicago, Ill.
H. Belmar	30,000	2820 Western Ave., Cincinnati, O.
Thomas Dolan	250,000	U. G. I. Bldg., Philadelphia, Pa.
Leslie D. Ward	50,000	Vice-Pres., Prudential Ins. Co., Newark, N. J.
F. H. Daniels	30,000	c/o A. S. & W. Co., Worcester, Mass.
P. W. Moen	20,000	c/o A. S. & W. Co., do.
F. McIlvried	$ 10,000	c/o S. & R. R. V. Ry. Co., Shreveport, La.
Michael Baackes	5,000	712 Wilson Ave., Cleveland, O.

Subscribers.	*Amount.*	*Address.*	
W. H. Grosman & Bro.	25,000	77 79 Broad St., New York City.	331
A. Hecksher	50,000	11 Broadway, New York City.	
E. C. Converse	100,000	74 Broadway, do.	
C. C. Cluff	15,000	1117 Empire Bldg., do.	
James Sim	15,000	1901 Empire Bldg., do.	
G. G. Crawford	5,000	Mgr. National Dept., National Tube Co., McKeesport, Pa.	
W. A. Cornelius	2,500	Asst. Mgr. National Dept., National Tube Co., McKeesport, Pa.	
R. C. Crawford	2,500	Auditor National Dept., National Tube Co., McKeesport, Pa.	
Mrs. E. K. Sussenthaler	5,000	2331 Albion Place, St. Louis, Mo.	
Theodore Rassieur	3,000	406 Market St., St. Louis, Mo.	332
Alfred Douglass	40,000	170 W. 59th St., New York City.	
M. R. Douglass	10,000	do.	
F. W. Douglas	10,000	do.	
Mrs. Adeline Schotten	5,000	3836 W. Pine Street, St. Louis, Mo.	
F. E. Patterson	10,000	c/o American Steel Foundries Co., 74 Broadway, New York City.	
P. E. Carhart	1,500	c/o Illinois Steel Co., Rookery Bldg., Chicago, Ill.	
Williams Estate	51,800	Miss. Valley Trust Co., St. Louis, Mo., Trustees.	
Ernest Boley	10,000	44 Sixth Avenue, Cleveland, Ohio.	
C. H. McCullough, Jr.	10,000	Gen. Supt. Illinois Steel Co., South Chicago, Ill.	333
Wm. A. Field	10,000	Asst. Supt. Illinois Steel Co., South Chicago, Ill.	
A. D. Waterman	10,000	1812 Empire Bldg., New York City.	
Prof. H. M. Howe	5,000	27 W. 73rd Street, New York City.	
Louis Schmidt	$ 10,000	c/o German Savings Institution, St. Louis, Mo.	
John Drain	5,000	3649 Cleveland Avenue, St. Louis, Mo.	
Mary E. Saylor	10,000	3700 Pine St., St. Louis, Mo.	
Charles Allis	25,000	President Allis-Chalmers Co., Home Ins. Bldg., Chicago.	
Silas W. Pettit	20,000	328 Chestnut St., Philadelphia, Pa.	

	Subscribers.	*Amount.*	*Address.*
334	William J. Chalmers	25,000	V. P. Allis-Chalmers Co., Home Ins. Bldg., Chicago.
	J. E. Cole	3,500	1709 Empire Building, New York City.
	Malvin Gutman	10,000	Newberg, Rosenberg & Co., 44 Broadway, New York.
	C. A. Vogt	5,000	345 No. Hermitage Ave., Chicago, Ill.
	J. H. Gray	2,500	Empire Building, New York City.
	Ferdinard Henke	3,000	2649 Chateau Ave., St. Louis, Mo.
	S. Otis Livingston	5,000	104 Reade St., New York.
	E. E. Stone	5,000	c/o A. S. & W. Co., Rookery Bldg., Chicago, Ill.
	J. A. Ruiloba	1,500	1812 Empire Building, New York City.
335	A. E. Harper	10,000	c/o Illinois Steel Co., Rookery Bldg., Chicago, Ill.
	O. O. Laudig	2,000	c/o Illinois Steel Co., South Chicago, Ill.
	Chas. K. Winslow	5,000	1812 Empire Building, New York City.
	W. E. Green	2,000	Gen. Supt. Cotton Belt System, Tyler, Texas.
	R. N. Dickman	5,000	1120 Rookery Bldg., Chicago, Ill.
	J. K. Mackenzie	2,500	1120 Rookery Bldg., Chicago, Ill.
	W. C. Potter	2,500	1120 Rookery Bldg., Chicago, Ill.
	J. C. Walker	20,000	1812 Empire Bldg., New York City.
	Thomas Murray	$ 2,000	1801 Empire Building, New York City.
336	Wm. Gillies	2,500	c/o Illinois Steel Co., South Chicago, Ill.
	L. Holmboe	1,500	c/o Illinois Steel Co., South Chicago, Ill.
	Otto Mann	1,200	1709 Empire Building, New York City.
	T. P. Alder	10,000	c/o A. S. & W. Co., Empire Bldg., New York.
		$2,500,000	

Consent and Order of Reference. 337

At a Stated Term of the United States Circuit Court, for the Eastern District of New York, held at the United States Court and Post Office Building, in the Borough of Brooklyn, New York City, on the 10th day of January, 1911.

Present—Hon. THOMAS I. CHATFIELD,
District Judge holding the Court.

338

JAMES SIM,
Plaintiff,

vs.

WILLIAM EDENBORN,
Defendant.

On reading and filing the annexed stipulation waiving a jury trial and consenting to a reference to hear and determine the issues herein, it is 339

ORDERED that this cause and the issues of law and fact herein are hereby referred to EDWARD W. HATCH, ESQ., of the City of New York, counsellor-at-law, as sole referee to hear and determine the same and that the expense of the reference for referee's and stenographer's fees be taxed as a part of the disbursements by the successful party and that judgment shall not be entered until after ten days' notice of the filing of

the report of the referee and of the judgment proposed to be entered thereon.

Enter.

THOMAS I. CHATFIELD,
U. S. D. J.

UNITED STATES CIRCUIT COURT,

EASTERN DISTRICT OF NEW YORK.

JAMES SIM,
Plaintiff,

against

WILLLIAM EDENBORN,
Defendant.

It is hereby stipulated that a jury trial of this action is waived; and that the issues of law and fact herein be referred to Edward W. Hatch, Esq., of the City of New York, counsellor-at-law, as sole referee to hear and determine the same and that the expense of the reference for Referee's and Stenographer's fees be taxed as a part of the disbursements by the successful party, and that judgment shall not be entered until after ten days' notice of the filing of the report of the referee and of the judgment proposed to be entered thereon.

Dated January 6, 1911.

STRONG, SMITH & STRONG,
Attorneys for Plaintiff.

MARTIN W. LITTLETON,
Attorney for Defendant

Referee's Report.

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UNITED STATES CIRCUIT COURT,

EASTERN DISTRICT OF NEW YORK.

JAMES SIM,
Plaintiff,

AGAINST

WILLIAM EDENBORN,
Defendant.

344

TO THE UNITED STATES CIRCUIT COURT:

The undersigned, heretofore duly appointed Sole Referee by an order of the United States Circuit Court for the Eastern District of New York to hear, try and determine the issues in the above entitled action, respectively reports:

That before entering upon the discharge of his duties as such Referee, he duly took and subscribed to the Referee's oath of office.

That he has been attended by Strong, Smith & 345
Strong attorneys for the plaintiff, by Theron G. Strong, counsel therein, and by Martin W. Littleton, attorney for the defendant, and Arleigh Pelham, counsel therein; has heard the evidence and testimony and the arguments of the respective counsel thereon, and considered the briefs filed by them in relation thereto; and after due deliberation being thereupon had, makes and renders the following decision upon the questions of fact and law involved, and finds as matter of fact the following:

Facts.

346 First: Prior to April 5, 1902, the defendant had acquired a controlling interest in the capital stock of the United States Iron Company. On that date he was the owner of 5,365 shares out of an issued capital stock of 9,250 shares and continued to be such owner until he transferred the same to the Sheffield Coal and Iron Company on or about the 30th day of December, 1902.

Second: In 1902, the defendant in connection with others conceived a scheme to consolidate the
347 United States Iron Company and other iron ore properties, erect blast furnaces for smelting iron ore and manufacture pig iron. Pursuant to such scheme and on or about April 5, 1902, the defendant prepared an agreement dated on that day which set out the terms of the proposed consolidation and to which the defendant invited subscriptions to the capital stock of the proposed new corportation to be formed. This agreement has been named the "Syndicate Agreement". It was received in evidence and marked "Exhibit No. 16", and the same is made a part of this report as though fully set out herein.

348 Third: Among the persons who were invited to subscribe to the syndicate agreement was the plaintiff in this action, Charles C. Cluff, Thomas B. Coles and Edward E. Stone. The subscriptions were made for the stock at the par value of one hundred dollars for each share. The plaintiff subscribed for 150 shares; Cluff for 150 shares; Coles for 200 shares and Stone for 50 shares.

Fourth: At and prior to the making of the subscriptions and each of them to the syndicate agree-

ment as found in finding "Third", the defendant failed and omitted to disclose his ownership of the shares of stock in the United States Iron Company and failed and omitted to disclose that he was possessed of any pecuniary interest in the United States Iron Company or of any interest therein. 349

FIFTH: The said subscribers to the syndicate agreement and each of them named in finding "Third" and referred to in finding "Fourth" had no knowledge of the defendant's ownership of the said shares in the United States Iron Company or of his being possessed of any pecuniary interest therein or of any interest therein. And the said subscribers and each of them made their said subscriptions, and each of them in ignorance of the fact of defendant's ownership of said stock and of his interest in said United States Iron Company. 350

SIXTH: It became and was the duty of the defendant at or prior to the making of the said subscriptions and each of them as found in finding "Third" to make full and complete disclosure of his interest in the United States Iron Company of his stockholdings therein and of any other interest which he had in such Company and in the proposed scheme provided for in the syndicate agreement, and to give to the said subscribers and each of them as full information as the defendant possessed in relation to said subscriptions, and of any fact which would affect their interest or the interest of any or either of them. 351

SEVENTH: After the proposed consolidation provided for in the syndicate agreement was made, the plaintiff and the said syndicate sub-

352 scribers named in finding "Third", each made discovery of the defendant's interest in the United States Iron Company existing at the time when each made his subscription thereto. Thereupon each of said subscribers elected to rescind his said subscription, gave notice of such fact to the syndicate managers and each of them offered at the time to restore and return the stock which each had received and of all benefits flowing therefrom, and each demanded the return of the money which he had paid therefor,

EIGHTH: The defendant and the syndicate
353 managers each refused to accept a return of said stock and refused to refund the money which had been paid therefore by each of said subscribers mentioned in finding "Third."

NINTH: Before the commencement of this action Charles C. Cluff, Thomas B. Coles and Edward E. Stone each assigned his claims and demands against the defendant herein to the plaintiff.

TENTH: The plaintiff and his assignors, and each of them, have been guilty of no laches in
354 asserting their claims and have omitted no duty or obligation which they owed to the defendant in the premises.

CONCLUSIONS OF LAW.

I find as Conclusions of Law:—

FIRST: That it became and was the obligation and duty of the defendant at the time or before the syndicate agreement was signed by the plaintiff and by the said Cluff and Coles, and also when defendant wrote to said Stone for his sub-

scription, to make adequate, full and complete disclosure of his ownership of stock in the United States Iron Company, and of all, each and every interest which he possessed therein, and of any fact which affected the interest of said subscribers to the syndicate agreement; that the defendant failed and omitted to make such disclosure. The defendant's failure so to make disclosure operated in law as a fraud upon the plaintiff and upon his assignors, and upon each of them. 355

SECOND: The plaintiff is now the legal owner of the said claims of Cluff, Coles and Stone, is entitled to enforce the same by legal remedy and is entitled to maintain this action. 356

THIRD: The plaintiff is entitled to recover from the defendant the following sums paid by him with interest:—

$3,750. with interest from July 20, 1902;
$5,000. with interest from August 30, 1902;
$5,750. with interest from November 29, 1902;
$2,250. with interest from December 20, 1902.

The plaintiff is also entitled to recover the following amounts paid by Charles C. Cluff: 357

$3,750. with interest from July 2, 1902;
$5,250. with interest from August 30, 1902;
$3,750. with interest from November 29, 1902;
$2,250. with interest from December 20, 1902.

The plaintiff is also entitled to recover the following amounts paid by Thomas B. Coles:

$5,000. with interest from July 3, 1902;
$7,000. with interest from September 2, 1902;
$5,000. with interest from December 1, 1902;
$3,000. with interest from December 22, 1902.

358 The plaintiff is also entitled to recover the following amounts paid by Edward E. Stone:

$5,000. with interest from January 1, 1903.

FOURTH: That said sums amount in the aggregate to $56,750, and the interest thereon at six per cent. from the date of said payments respectively amounts to the sum of $33,969.34 which said principal and interest together amount to the sum of $90,719.84 for which said sum the plaintiff is entitled to judgment, and for which sum judgment is accordingly directed to be entered, together with the costs of the action.

359 Dated, July 2, 1912.

EDWARD W. HATCH,
Referee.

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Referee's Opinion. 391

UNITED STATES CIRCUIT COURT.

EASTERN DISTRICT OF NEW YORK.

JAMES SIM,
Plaintiff,

against

WILLIAM EDENBORN,
Defendant. 362

THOMAS P. ALDER,
Plaintiff,

against

WILLIAM EDENBORN,
Defendant.

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BY THE REFEREE:

These actions are brought to recover damages based upon the claimed prior rescission of a contract and to recover back moneys paid thereunder as having been induced by fraud. By stipulation the two actions were heard together, the evidence being applicable to both issues. They have been so tried, argued and submitted for decision.

The various litigations which have been had arising out of the transaction which furnishes the basis for these actions have, to a consider-

364 able extent, resulted in establishing certain rules of law which have become, in substantive aspect of the case, controlling upon the referee. These actions were commenced in the State Court and were subsequently removed into the United States Court for trial. Demurrers were interposed to the complaints in the Federal Court and were sustained. Thereupon the plaintiff amended his complaint, demurrers were again interposed, which, after argument, were overruled and the complaints upheld.

There is considerable diversity of view between counsel as to the effect of the judgment overruling
365 the demurrers which were thus interposed. Upon one point, however both are agreed that the decision of the Federal Court is binding upon the referee. There is this difference, however, between counsel. The defendant insists, to use his own language, "the views expressed by Judge Chatfield in his opinions constitute the law of this case, and the referee is bound by it." The plaintiff contends that the opinions delivered by the learned judge are not necessarily conclusive, but that the formal judgment entered upon the decision is.

366 The latter contention commends itself to the referee's view of the law. If there be any inconsistency between the assigned reasons contained in the opinions and the judgment entered thereon, the latter must control. We have carefully examined the opinions of the learned judge and also the language of the judgment and do not find any substantial disagreement between the reasons assigned and the judgment based thereon. It is not necessary to enter into detailed analysis to establish the harmony, as we reach the conclusion that we are bound by this judgment it alone is to be considered. It provides.

"First, that the said complaint states facts 367
sufficient to constitute a cause of action. Second, that there is no defect of parties defendant. Third, that the complaint states a cause of action at common law based on the rescission of a contract alleged to have been procured by fraud."

The clear expression of the judgment is that the complaint stated a good cause of action based upon a rescission of the contract for fraud in its procurement. At the outset, therefore, we are confronted by a binding adjudication which excludes argument based upon a consideration that 368
the complaints themselves do not state a good cause of action. The adjudication forecloses that subject and leaves as the only open question in these actions whether fraud has been established by the evidence. If actual fraud be found to exist based upon affirmative act or flowing therefrom as a legal conclusion by necessary construction, plaintiff would seem to be entitled to recover.

At the close of plaintiff's case the defendant made a motion that the plaintiff be compelled to state upon which of the remedies set out in the amended complaint elected to stand. Plaintiff 369
thereupon elected to stand upon a cause of action based upon a prior rescission of the contract and to recover back the money paid thereon as having been induced by fraud. It, therefore, appears with considerable clearness that the plaintiff's position as a legal result rests fairly upon the judgment of the Federal Court as expressed therein.

In addition to this the plaintiff is fortified in his position by the decision of the Court of Appeals in *Hecksher v. Edenborn* (203 N. Y., 210). In that case the Court of Appeals had before it for decision the sufficiency of a complaint which

370 was in all respects similar to the complaint in the present action. It reached a conclusion, reversing the judgment of the Appellate Division, that the complaint stated a good cause of action based upon a prior rescission and held that moneys paid upon the contract which had been induced by fraud, whether actual or constructive, could be recovered back.

Some criticism is made by the learned counsel for the defendant of this decision and the reasons assigned therefor in reaching a conclusion. We do not feel called upon to enter into any extended discussion of this question. It appears affirma-
371 tively in the briefs presented upon this submission that, in the main, the questions upon which the criticism of the opinion is based were presented and argued in the briefs submitted to the Court of Appeals in that case. So that the court, having before it the substantial elements which are now urged upon our attention, decided adversely to the defendant's contention and for all practical purposes this decision constitutes it an authority in the disposition of the matters involved.

The question, therefore, of whether the com-
372 plaints state a good cause of action is not here presently debatable, for by both federal and state decisions we are confronted by decisive, controlling authority. The only question, therefore, which is left for decision is, has fraud, either actual or constructive, been established by the evidence.

The discussions which have been had by the justices of the Appellate Division (Hecksher *v.* Edenborn, 131 App. Div., 253) and in the Court of Appeals indicate quite clearly that each court regarded this case as quite removed from the usual prevalent conditions surrounding a promoters'

scheme. It is quite evident that the defendant in 373
organizing the corporation to take over the several properties mentioned in the syndicate agreement believed, and such belief had for its support a substantial basis, that the proposed consolidation would prove extremely profitable. The acts of the defendant in connection with the entire transaction when fairly examined indicate that he had an abundant confidence in the success of the business and believed that it would prove highly profitable and believing this it is more than likely that he gave expression to his views with a considerable degree of confident optimism. The view
of the courts as expressed in their opinions has 374
been quite uniform in reconciling the representation made by the defendant to the several subscribers to the stock with good faith and have regarded several of the representations relied upon by the plaintiff in this action as establishing actual fraud as insufficient for such purpose and innocuous in themselves. We have carefully examined the evidence bearing upon the question of actual fraud and while we regard it as sufficient in some respects to support a finding of fraud yet when the whole is taken together and fair consideration given to it in connection with the character of the scheme and existing conditions we 375
find ourselves far from satisfied that the defendant, in what he did, was actuated by evil motives and made the representations with intent to defraud. On the contrary, the final impression resting in our mind is that the defendant believed in the integrity of the business scheme which he proposed to exploit and had an abundant faith that it would ultimately prove to be profitable in the highest degree. Such a situation tends strongly to exclude the existence of fraud in any representation which he made as an actual fact.

376 We, therefore, reach the conclusion upon this branch of the case that the evidence is insufficient upon which to base a finding of actual fraud.

This brings us to a consideration as to whether upon all the evidence in the case we are required to find constructive fraud and upon this branch of the case we have little difficulty in reaching a conclusion upon practically undisputed facts that its existence must be so found.

The defendant occupied to the proposed scheme, the syndicate agreement and the subscribers thereto, a fiduciary relation. He was at that time the owner of five thousand six hundred and thirty-
377 five shares of the United States Iron Company which was fifty-eight per cent. of the outstanding capital stock of such company. In legal effect the so-called syndicate agreement was a power of attorney constituting the defendant and his associates, agents and trustees of each of the subscribers thereto. Such seems to be the conclusion reached by the Court of Appeals in the Hecksher case and such view finds support in

Old Dominion Copper Co. v. *Bigelow,* 203 Mass. 159;

Old Dominion Copper Co. v. *Lewisohn,* 210
378 U. S. 206;

Williamson v. *Krohn,* 66 Fed. Rep., 655.

Under such circumstances the law imposed upon the defendant the duty of making adequate, full and complete disclosure of his relation to and pecuniary interest in the property with which he was dealing and for which the subscribers to the syndicate agreement were to pay. The defendant could not suppress information or omit full disclosure in connection with the matter without

being chargeable with the legal results flowing therefrom. 379

Dickerman v. *Northern Trust Co.* 176 U. S. 181.

Each of the subscribers who are represented in this action have testified that they knew nothing of the ownership by the defendant of the capital stock of the United States Iron Company. On the contrary, they testified that they had no information at the time of making the subscription that the defendant was the owner of stock in the United States Iron Company and did not learn of such fact until the Hecksher action was tried. 380 This testimony is practically uncontradicted and must be taken as true in every substantive aspect. The defendant does not claim that he at any time made disclosure to any of the subscribers to the syndicate agreement of his ownership of the shares in the United States Iron Company. In fact the relation between the defendant and the subscribers to the syndicate agreement made the former the seller and the buyer of his own property while acting as agent in a fiduciary capacity for the latter. The law does not tolerate such relation and stamps such transaction with the 381 badge of constructive fraud and sets it aside in a proper action at the instance of the party affected thereby. So far as actual disclosure of these facts by the defendant is concerned, it is not claimed that he made any at the time the subscriptions were made to the syndicate agreement. It is claimed by the defendant, however, that the plaintiff, or some of the subscribers to the syndicate agreement represented in this action, had knowledge of defendant's relation to and connection with the United States Iron Company or of such facts as put them upon notice of such relation. In

382 the main this testimony consists of the following facts.

Mr. Stone, one of the plaintiff's assignors, was in the same building in Chicago where the defendant had his office; that the name of the United States Iron Company was up on the door and when the defendant moved his office to New York he requested Mr. Stone to sell the office furniture, which he did, and it is claimed from this that the inference arises that Mr. Stone knew what defendant's relation to the United States Iron Company was. It further appears that the defendant disclosed to Mr. Cluff, in the early part of 1901, in
383 a casual conversation, that he and Mr. Gates had parted company and in dividing up their property Mr. Gates took the Kansas City syndicate and that defendant took the United States Iron Company and from this it is claimed that an inference arises of knowledge upon the part of Mr. Cluff and others to whom this fact was also communicated of defendant's interest in that property. There also was published a book containing a list of corporations which embodied the defendant's official relation to the various corporations mentioned therein in which was included the United States Iron Company of which he was shown to
384 be an officer. This book had a general circulation among the employes connected with the various corporations and was accessible to the plaintiffs and their assignors or some of them. A short time after the subscriptions were made to the syndicate agreement there was published in the Iron Age, a trade paper, which has a general circulation among the iron industries of the country, a statement of the formation of the syndicate, the properties taken over, the defendant's relation thereto and ownership therein. We do not understand that it is claimed that this article

was notice to the plaintiffs or their assignors prior to the making of the subscriptions to the syndicate agreement. Its only effect is that within a comparatively short time after such subscriptions were made general information was given of the relation and that this imposed upon the plaintiffs prompt action if they sought to be relieved from the binding character of the agreement. Aside from this it is has no effect. 385

In substantive matter this constitutes all of the testimony, with an exception to be hereafter noted, given by the defendant to show that the plaintiffs and their assignors had knowledge of the defendant's interest in the United States Iron Company. Giving to the testimony such force as it is fairly entitled to receive it falls short of establishing the existence of knowledge constituting it the equivalent of a disclosure which the defendant was obligated to make. It does not disclose that the defendant was the owner of fifty-eight per cent. of the stock of the United States Iron Company when the subscriptions were made, or of any greater or less interest therein. At the most its probative effect would be to authorize an inference that at some time the defendant might have had an interest in the United States Iron Company, but it falls short of establishing that at the time when the subscriptions were made he was such owner or had any interest whatever, for it was quite as consistent that he parted with his interest as it was that he retained it. The law required full, complete and fair disclosure of every material fact showing defendant's relation to and ownership in the United States Iron Company at the time when the subscriptions to the syndicate agreement were made. Attaching full force to every circumstance narrated above or given in evidence and it falls 385 387

388 far short of being sufficient to establish knowledge upon the part of the syndicate subscribers of defendant's relation to and ownership in the stock of the United States Iron Company and, therefore, defendant's contention in this respect must fail.

It is further claimed that Mr. Coles had actual knowledge of defendant's interest within two weeks after he had made his subscription to the syndicate agreement. It appears in the testimony that within ten days or two weeks after Mr. Coles had subscribed he carried Mr. Edenborn a copy of a letter which he received from a friend
389 in Tennessee and which contained this language:

> "Referring to the development of the ore lands in the South in which Mr. Edenborn is interested. * * * not knowing the location of Mr. Edenborn's property, but knowing that it was near the Tennessee river, it seems to me that these properties would not be far apart."

From this statement it is argued that Mr. Coles is completely cut off from any relief for the reason that he must have known at that time of defendant's interest and it required prompt action upon
390 his part in asserting that his subscription was avoided by reason of such fact.

This conclusion, we think, is not admissible upon such slight testimony. It was known that the defendant was interested in the exploitation of the property because the syndicate agreement provided therefor. The communication from the writer in Tennessee does not disclose what interest the defendant had or in what property. It does not appear that the United States Iron Company was the property to which reference was made and we think it would be going to an unwarrant-

able length in holding Mr. Coles estopped from now asserting his rights by reason of laches. There is nothing in the communication, as we view it, which constitutes any disclosure of personal interest of the defendant in the United States Iron Company. On the contrary, taking it as a whole, it is quite consistent with the understanding of the interest which was expressed and well known in the syndicate agreement and as it does not mention any specific property it would be drawing an unwarranted inference to say that it notified Coles of defendant's interest in the United States Iron Company. 391

We have carefully considered all of the testimony presented in this record with a disposition to relieve the defendant in view of the fact that we declined to find the existence of any evil intent, but giving full force and effect to the whole of such testimony we are unable to find that it arises or even approaches the equivalent of a full, free, fair and complete disclosure of defendant's interest, which is an absolutely essential requirement where a fiduciary, acts in his own interest and at the same time represents another as trustee. We conclude, therefore, that the defendant has failed to establish a defense upon this branch of the case and that the plaintiffs are entitled to recover. 392 393

It is insisted, however, that the plaintiff Alder cannot recover for the reason that he was not a subscriber to the syndicate agreement but purchased his stock after all of the signatures had been made thereto. It appears, however, that the defendant and Mr. Alder had a conversation about the proposed syndicate before such subscriptions were all made and that Alder was unable at that time to subscribe for lack of funds. It is not claimed by the defendant that he made

disclosure to Alder of his relation to and ownership in the stock of the United States Iron Company. He said nothing to him upon such subject. The defendant knew that Alder contemplated making a subscription and was asking for information. He could not omit disclosure and subsequently sell to Alder stock of the syndicate subscription any more than he could accept his subscription in the first instance and withhold the information. It appears clearly that Alder talked with the defendant about the scheme and wanted to acquire an interest therein. Of this fact the defendant was informed as clearly as he was of the fact in relation to those who actually subscribed to the agreement and when Alder ultimately purchased the stock the same obligation rested upon the defendant to disclose his interest as it did to any other person and the same rule of liability must attach in the one case as in the other. The transaction was so connected with the original scheme as to make it part thereof and imposed the same obligation and duty upon the defendant towards Alder as towards the parties to the syndicate agreement. As we view it the rule of law is the same in one case as in the other.

It necessarily follows from these views that the plaintiffs are entitled to recover.

Judgment. 397

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

JAMES SIM,
Plaintiff,

AGAINST

WILLIAM EDENBORN,
Defendant. 398

The parties to the above entitled action having by a stipulation in writing waived a jury trial of the same and having consented to the appointment of Edward W. Hatch, Esq., Counsellor at Law, as referee to hear and determine the issues of law and fact therein, and an order having been duly made and entered in accordance with said stipulation appointing said Edward W. Hatch, Esq., as referee to hear and determine the same, and the said referee having heard the evidence and testimony and arguments of the respective counsel and considered the briefs filed by them, and after due deliberation being thereupon had, made and rendered his decision upon the questions of law and fact involved and stated separately his findings of fact and conclusions of law and rendered his report of the same, wherein and whereby he finds and decides that the plaintiff herein is entitled to judgment against the defendant for the sum of Ninety thousand seven hundred and nineteen 84/100 ($90,719.84) dollars 399

400 and for which sum judgment is accordingly directed to be entered, together with the costs of the action.

And the report of said referee having been duly filed and a copy thereof served with the proposed judgment to be entered thereon, and application having been made to this court upon notice to the defendant's attorney for the entry of said judgment, and the defendant having duly moved the court before the entry hereof for a new trial upon a case and exceptions, which said motion was denied, and plaintiff's costs and disbursements having been duly taxed at the sum of
401 Two thousand eight hundred and eighty-two and 26/100 Dollars ($2,882.26);

Now, on motion of STRONG, SMITH & STRONG, attorneys for plaintiff, it is ordered and adjudged that the plaintiff James Sim have judgment against the defendant William Edenborn for the sum of Ninety thousand seven hundred and nineteen 84/100 ($90,719.84) dollars with interest from the date of the report of the referee, July 2, 1912, amounting to the sum of One thousand, three hundred and sixty and 80/100 Dollars ($1,360.80), and for his costs and disbursements
402 as taxed, amounting to Two thousand eight hundrel and eighty-two and 26/100 Dollars ($2,-882.26), which said several sums amount in the aggregate to the sum of Ninety-four thousand nine hundred and sixty-two and 90/100 Dollars ($94,962.90), for which judgment is rendered accordingly, and that the plaintiff have execution therefor.

Dated, October 1st, 1912.

RICHARD P. MORLE, Clerk.

By J. G. COCHRAN, Deputy Clerk.

Filed and entered
October 1st, 1912.

Narrative Statement of Proceedings Before Referree.

The issues in this action duly came on to be tried on the 6th day of February, 1911, and on subsequent dates to and including December 29th, 1911, pursuant to regular adjournments, before Edward W. Hatch, Esq., the Referee appointed upon consent by the Court to hear and determine the issues herein.

MR. THERON G. STRONG appeared as Counsel for the Plaintiff; and

MR. MARTIN W. LITTLETON appeared as Counsel for the Defendant.

The plaintiff opened the case in part as follows:

> "The actions are brought for fraud and deceit on the part of Mr. Edenborn. ..... At the outset a complaint was prepared and served which was based on the ground that a rescission had been had; we tendered back the stock that we had received and demanded back the money that we had paid and notified Mr. Edenborn that we elected to rescind. That complaint came before Judge Chatfield over in Brooklyn and it was demurred to for insufficiency in one respect and was sustained on the ground that there was no statement of damages. To utter no criticism upon the decision, the demurrer being sustained, an amendment was made to the complaint, and another demurrer was interposed and that demurrer was immediately overruled and the sufficiency of the complaint sustained, so that now we come before you in this position, that we are seeking here to recover from Mr. Edenborn what we have paid under this syndicate agreement, or the damages which we have sustained."

406 James Sim.

To maintain the issues on his part the plaintiff then called as a witness,

JAMES SIM, who, being duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Strong:

I am the plaintiff in this case and reside at 288 Jefferson Avenue, Brooklyn. I resided there at the time of the commencement of this action. I am secretary to Lord Leith of Fyvi. Before
407 I had that position I was in the steel business, I was assistant secretary of the Illinois Steel Company, afterwards second vice-president of the Federal Steel Company, until that company went into the United States Steel Corporation. I have known the defendant for quite a number of years. I knew him when I was in the steel business, by reputation. He was connected with the American Steel & Wire Company, and a man prominent in the steel industry at that time.

Q. Reputed to be a man of wealth, was he?

MR. LITTLETON: Objected to.

408 MR. STRONG: I think I can show his general repute, anything to create confidence.

THE REFEREE: Objection overruled. Exception taken by Mr. Littleton.

A. He was a man reputed to be wealthy, of large affairs, and well known in the steel circles, and I assume elsewhere.

At the time that I was connected with the Illinois Steel Company, I had seen him in the office, I do not remember just when

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I actually met him, but I had seen him a number of times in the City, in the office and around. I knew him by repute. I met him after we moved to 71 Broadway, I remember that because he was in the same building; he was a director of the American Steel & Wire Company, and they were on the 20th floor; we were on the 17th floor. Up to that time I had very slight personal intercourse with him, perhaps a bowing acquaintance. No business beyond that. I first heard of this blast furnace syndicate, as it is called, some time in the late spring or early summer of 1902, through Mr. Cluff. Mr. Cluff was assistant general manager of sales of the Carnegie, Illinois Steel, and some of the other companies. These were subsidiary companies of the United States Steel Corporation. He had been general eastern agent of the Illinois Steel Company. My friendship with Mr. Cluff still continues. He is now general manager of sales in New York, of the companies I have named; the Illinois Steel Company, the Carnegie Steel Company, the Tennessee Coal & Iron Company. After I heard of this blast furnace syndicate through Mr. Cluff, I called on Mr. Edenborn in his office. I told him that I had come in reference to the matter about which he had been speaking to Mr. Cluff, and Mr. Edenborn then told me about the plan. Mr. Edenborn told me that this was a plan to form a blast furnace company, that they had an option on some iron ore property in the south, and coal properties, and they proposed to form a blast furnace company, which would be a small company, in the family as it were. He produced a syndicate agreement—this is the one he produced (indicating paper) with the list or partial

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412 list of subscribers. He handed the agreement with the list attached, pinned to the end of the text. About the subscriptions, he said that he himself had subscribed $500,000, in cash, and others—other amounts had been subscribed, showing me the names, and told me that the syndicate agreement would give me the details of the information about the plan; that we would all come in on the same footing, that every man's dollar would be put up against every other man's dollar, that there would be no commission to any
413 of the underwriters; no commission to the underwriters, or in the underwriting no commission or special advantages to anybody; and that the property was a paying property; and he told me that this was not a Wall Street speculation, it was something I could put away in the box, and he said there would be no difficulty in paying handsome dividends on the Company after they had got into operation and after they had erected blast furnaces, of which I think they proposed to erect two. He said, "They are all coming in on the same basis." He said that the scheme
414 was being organized in good faith, that everybody's dollar was to be put up against everybody else's dollar, that there would be no special advantages to anyone, there would be no commission paid to any of the parties organizing the Company, that he had subscribed $500,000, and the others shown on the list, the amounts stated opposite their names. I asked him about some other parties, if they were coming in, and he said he was keeping an amount open for some other parties; and that this was a paying property, that when they erected the blast furnaces, at the price that iron was selling at, even if it declined con-

siderably from that figure, there would be a handsome profit, and we would get large dividends; that there was not any speculation about it, that the thing was a good scheme. He said that the amounts would be called at certain times, that the subscriptions were payable in cash on certain dates. The calls had not then been sent out. I took the copy of the syndicate agreement with me and went over it very carefully, had a number of conferences with Mr. Cluff, and in view of what Mr. Edenborn said I decided to take an interest to the extent of $15,000. 415 416

I absolutely relied on what Mr. Edenborn said, believing what he said to be true, and I thought that if Mr. Edenborn was willing to put $500,000 in cash into a proposition of that sort it was quite safe for me to put up my small amount. I had no knowledge whatever to the contrary of these representations. I had a further interview with Mr. Edenborn after looking over the paper, and after these conferences which I have mentioned, Mr. Cluff and I called on Mr. Edenborn at his office together. In my presence and that of Mr. Cluff he stated that this was a good proposition, it was not any speculation, that it was being organized in good faith, there would be no commissions to anyone, that every man would get the same treatment, every man would put up his dollar against every one else's dollar, that he had subscribed $500,000 in cash himself, and that he thoroughly believed in it, and advised us to take the subscription. He said there would be no advantages to anyone, everybody would be on the same basis, put up their dollar against everyone else's dollar. On these recommendations I signed the syndicate 417

agreement with Mr. Cluff. Mr. Cluff signed for himself and I signed mine for $15,000, and left the signed document with Mr. Edenborn in his office, delivered it to him. That is the signed document. I retained the copy I had had previously.

MR. STRONG: The copy of the syndicate agreement, already referred to in the testimony of the witness, I now offer in evidence, together with the slip, memorandum of subscriptions, attached.

The papers were admitted in evidence and marked Plaintiffs' Exhibits Nos. 1 and 2 respectively, February 6th, 1911, C. B.

I had sufficient trust and reliance upon what Mr. Edenborn said to subscribe that amount of money, and was willing to pay out $15,000 on some plan that he was willing to put $500,000 into. I noticed that the syndicate agreement referred to the United States Iron Company. I had not known of that Company at all before this syndicate agreement was presented to me—never heard of it. I did not know that Mr. Edenborn had any interest in the United States Iron Company—none whatever. I did not know that he had any interest in the United States Iron Company.

Q. Had you known that fact, that he was interested in the United States Iron Company, and had a controlling interest in the United States Iron Company, would that have made any difference with respect to signing this syndicate agreement?

MR. LITTLETON: The question is objected to upon the ground that it calls for incompetent testimony, if the Court please, the

witness' attitude of mind. It is practically calling for recollections or pretends to call for his recollection of what his attitude was at that time, when as a matter of fact it calls for his opinion now. He cannot state what his attitude would have been at the time, because he had no such attitude if his first statement is true. He cannot recollect a state of mind which did not exist. 421

THE REFEREE: I think that form of question is objectionable, but I think he may testify as to whether or not he would have made the subscription had he known of Mr. Edenborn's relation to these properties, because it is a fact which I think he may testify to that he was influenced by any representations made to him. 422

MR. LITTLETON: The point I make, your Honor, is that as there was no representation either way on the subject, except a lack of knowledge on his part and a lack of disclosure, if that contention be true, by Mr. Edenborn, that the witness in now undertaking to state what he would have done under those circumstances is not stating anything except his present attitude or his subsequent attitude on the subject, because that fact was not before him. 423

THE REFEREE: You may be right about that as a mental conclusion, but I think the law recognizes that he may state as of that time whether he would have done this had he known the fact.

Exception taken by Mr. Littleton.

424 A. If I had known that Mr. Edenborn owned the controlling interest in the company selling that to us, and that he was not putting up $500,000 in cash, I certainly would not have signed that agreement.

These subscriptions or payments of calls under the syndicate agreement, were payable at certain definite times. I do not think the dates are mentioned in the agreement. "As called" I think that was it. The calls came as the money was required. When the calls were made I responded.
425 I paid my proportion. Calls were made. I think the first one I paid on or about or before the 30th of August. That paper you show me is the allotment addressed to me, that I had been allotted $15,000.

MR. STRONG: I offer it in evidence.

The paper was admitted in evidence and marked Plaintiffs' Exhibit No. 3, February 6th, 1911, C. B.

I do not recollect the date when I subscribed to the syndicate agreement. It must have been sub-
426 sequent to the 15th of April and before the first payment was made in August. That paper addressed to me which you show me is the first call, June 19th, 1902, for $3,750, to be paid on the 30th of June.

MR. STRONG: I offer that in evidence.

The paper was admitted in evidence and marked Plaintiffs' Exhibit No 4, February 6th, 1911, C. B.

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There were four payments—June, August, September and December. Here is one dated August 15th. That is another.

MR. STRONG: I offer that in evidence. The paper was admitted in evidence and marked Plaintiffs' Exhibit No. 5, February 6th, 1911, C. B.

There were two other subsequent calls similar in form to these that have been offered in evidence. I paid in the whole $15,000. I received 428
the stock in payment of my subscription shortly after the payment of the last subscription, about December 31st, 1902, or the first or second of January, 1903. I do not think I had any other interviews with Mr. Edenborn prior to the receipt of my stock, except those two that I have testified about, unless going into the office to pay my subscription, and I saw him during the summer occasionally, because I was on the lower floor in the same building. I did not have any conversation about this matter with him. There was a letter from Mr. Edenborn about a blast fur- 429
nace I think; that is about the only thing I remember. From time to time I received notices of meetings of the Company, and the annual meetings or annual stockholders' meetings, which I attended in Jersey City. I also received circulars with reference to a proposed issuance of bonds, different circulars; I received several circulars about it. The one dated August 30th shown me is one of them that I received from the Syndicate managers.

MR. STRONG: I offer that in evidence. The paper was admitted in evidence and

430 marked Plaintiffs' Exhibit No. 6, February 6th, 1911, C. B.

This paper shown me, dated December, 1903, is another circular I received, or another letter. It is signed by Mr. Edenborn.

MR. STRONG: I offer it in evidence. The paper was admitted in evidence and marked Plaintiffs' Exhibit No. 8, February 6th, 1911, C. B.

431 The mark "confidential" was on it when I received it. After this confidential one I received another as sort of a reminder that I had not taken my proportion of the bonds, and asking me to send my subscription. I also received this circular.

MR. STRONG: I offer it in evidence. The paper was admitted in evidence and marked Plaintiffs' Exhibit No. 8, February 6th, 1911, C. B.

432 I attended the annual meetings of the company in Jersey City. I was never a member of the Board of Directors or anything like that. I had no part whatever in the management of the Sheffield Coal & Iron Company.

I called on Mr. Edenborn at his office once or twice to ask him some questions about the Company. But the most information I got, or the most I got him to say, was at the annual meetings, about the operations of the Company, and what they were doing, their output, etc. It was just shortly before commencing this suit, and it

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must have been in the summer of 1906, that I first heard that Mr. Edenborn owned a controlling interest in the United States Iron Company at the time of the subscriptions to the syndicate. As I was going home from an annual meeting I did not know that Mr. Edenborn at that time owned the United States Iron Company, but I was beginning— The first thing that aroused any suspicion in my mind was the fact that the Company had gone down so far, and Mr. Edenborn resigned the presidency, which he said at the time we made the subscriptions he was going to be, he was going to keep the management of the Company himself, and by this time he had resigned the presidency, and the Company had got into difficulties; and I heard that there was a suit, soon after that, started by others. The plaintiff in that case was August Hecksher and Frank Backus.

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Q. Well, what did you hear in connection with that that aroused your suspicion?

MR. LITTLETON: I object to that.
THE REFEREE: I think he may state.
Exception taken by Mr. Littleton.

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A. Well, I heard that there was a suit brought against Mr. Edenborn by some of the subscribers to the agreement, August Hecksher and Frank Backus and others.

I heard of this suit by Hecksher. We sent a man to find out the facts that had been proved or the nature of the testimony that had been adduced on that trial. We sent a man to find out. I did not know what it was until after he had gone to the court to hear the trial—sent there. I did not

436 go personally. That is the first definite information I had, from the facts that were developed on the trial of the case of Hecksher against Edenborn. I commenced this suit immediately after that—or, I tendered the stock immediately after that. It is conceded that the stock was tendered back and a demand made for the amount paid before the action was commenced. (See Exhibit 72.) I have never been paid anything, any part of the amount that I claim in this case. I never received anything by way of dividend or otherwise from
437 the Sheffield Coal & Iron Company.

Q. Do you know about the subsequent proceedings in connection with the Company?

Mr. Strong: I might as well tell you, Mr. Littleton, if you want us to produce all the documents, of course, we will have to do it, but there are certain facts that are known to you just as well as to me, and that is that this Company went into the hands of a receiver, that it became financially embarrassed and went into the hands of a receiver, and that it was sold out under a
438 reorganization, and that the Sheffield Coal, Iron & Steel Company was organized, and that the stockholders in this Company were allowed to participate therein to the extent of 25 per cent. of the common stock.

Mr. Littleton: What you say is, no doubt, a correct statement of the facts. I should object to the testimony if it were here. I heard your statement in your opening about all that, but I did not object to it then. I should object to it under the pleadings. I will leave out the question

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of the competency of the witness to speak on the subject if you wish to prove generally by him that they did subsequently go into the hands of a receiver, and that subsequently certain general things did happen. I won't object on the ground that it is not the best evidence. I will leave that objection out.

MR. STRONG: Of course, if that is satisfactory to the Referee it will be to me. All I want to prove is the downward course of the Company, until finally it got to a point where it was sold out and reorganized, and the only participation that the stockholders got in it was 25 per cent. of the common stock.

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MR. LITTLETON: The objection to that character of testimony rests on the fact that the downward course of the Company, as you call it, is not essential or necessarily in any wise connected with, nor does it flow from, the thing that you complain about, to wit, the fact that you did not know that Mr. Edenborn owned the controlling interest of this Company.

441

MR. STRONG: I am only offering it, I will tell you frankly about it—it is competent on the question of damages, to show the course of the Company after the parties went into it, and to show that the whole thing went down until it was virtually wiped out.

MR. LITTLETON: If you had a right to rescind your obligation or contract on the ground that Mr. Edenborn had withheld a

442 necessary fact which he should have disclosed in a confidential relationship, it does not make a twig's difference whether the Company went up or down, or blew up or blew over, you have a right to that particular thing.

THE REFEREE: I think that is so, Mr. Strong, as far as the right to relief depends upon the fraudulent representations. But, Mr. Littleton, is it not competent to take that proof as bearing upon the
443 value of the stock and the amount of the loss sustained? Suppose this Company had been prosperous and the stock had gone up so that it was worth really more than the amount that this party paid for it?

MR. LITTLETON: He could recover the amount that he had paid in—that is, we did not take back his tender; you see, he simply tendered and said, I want back what I paid, because regardless of whether this was a good or a bad bargain, you sus-
444 tained a relationship to this which was impossible at the time. The point I made is, that that would arbitrarily fix the plaintiff's status in the case, that if the fact was withheld and not disclosed, would entitle the plaintiff to recover; inevitably his right to recover is fixed, whether the stock went up or down.

MR. STRONG: That is not what your associate claimed. There is a peculiar situation here. Of course, there was an attempt to rescind, and if that attempt to rescind was effectual because of our right to

rescind, then we are entitled to recover back our money. But if for any reason the rescission was not effectual, if there was not a right to rescind and it was a nullity, a mere attempt to rescind would not amount to anything, and you would still have your right to recover damages. There are some recent cases on that subject which recognize that view. For instance, there was a case some time ago where an action was brought on the theory of a rescission, and it was held that they had not any right 446
to rescind. They were allowed to have an action for damages. So that if for any reason in this case the rescission was not effectual, and amounted to nothing, if it was a mere nullity, the right to recover damages, so long as a cause of action was stated which would give a right to damages, would be plain. I am offering this evidence simply for the purpose of showing the value of the stock.

MR. LITTLETON: I have just been over these cases trying to prepare a complaint 447
in a case something like this. This is either a suit as upon a rescission, or it is a suit for fraud and deceit for whatever damages grew out of the fraud and the deceit *pro tanto,* or it is a suit for a rescission—I do not mean the complaint makes it so, but I mean the action has got to find itself somewhere within that locality. If it is a suit as upon a rescission already had, it makes no difference what became of the stock afterwards, if the theory claimed is a sound one. It may be right to this extent,

448 that if it should turn out to be simply an action for fraud and deceit and the rescission failed for any reason, the rescission was ineffectual, as Mr. Strong put it, it must be that that evidence will be proper to prove damages.

THE REFEREE: It was stated by Mr. Strong that this was an action for fraud and deceit, although his proof shows an attempt on the part of the plaintiff to rescind the contract and tender back the

449 stock.

MR. STRONG: On the ground of fraud and deceit.

THE REFEREE: I am rather inclined, Mr. Littleton, to think that upon the question of the value of the stock received they may show that it was worthless.

MR. LITTLETON: Of course, if they go into that by this evidence, I will call your Honor's attention to this fact, and I will call Mr. Strong's attention to it, if they go into the proof of the receivership of this

450 Company and the subsequent reorganization and sale of the stock, the illogical effect of it is just here, it may well have been that a thousand other contributing causes brought about that receivership. It frequently does. It may have fallen afoul of some ill fortune that nobody could have anticipated. It may require me to step in between one thing and the other and set up and prove the real value of this stock from an intrinsic standpoint. I can do it, and I am willing to do it, if it becomes necessary.

451

THE REFEREE: Inasmuch as you have raised this question now, and it is not necessary to dispose of it now, if you have any authority that you desire to call my attention to, just send me a letter, each one of you.

MR. LITTLETON: I will send you the briefs in the Hecksher case. I think they contain a discussion of this particular point, because Mr. McVeagh and Mr. Jennings made the brief in that case, and they are very eminent men and probably made a very 452 sound brief in it.

MR. STRONG: That was an entirely different case. It was brought and sought to be maintained on the ground that the confidential and trust relations which he bore to these people were such that he was incapacitated from dealing with his own property, and that if they did not know that he was dealing with his own property they could recover. The whole idea was that the syndicate agreement here was an improper agreement. The judges had it 453 pretty hot back and forth, evidently, there, because they did not seem to agree about anything.

THE REFEREE: You may send in anything you choose, of course, and I will look at it.

MR. STRONG: In connection with Exhibit No. 5, I offer in evidence acknowledgment of July 2nd, 1902, by William Edenborn, chairman, of Mr. Sim's check.

The paper was admitted in evidence and marked Plaintiff's Exhibit No. 5A, February 16th, 1911, C. B.

454 MR. STRONG: I offer in evidence acknowledgment dated August 30th, 1902.

The paper was admitted in evidence and marked Plaintiff's Exhibit No. 10, February 16th, 1911, C. B.

MR. STRONG: A similar paper dated November 29th, 1902.

The paper was admitted in evidence and marked Plaintiff's Exhibit No. 11, February 16th, 1911, C. B.

MR. STRONG: A similar paper dated De-
455 cember 22nd, 1902.

The paper was admitted in evidence and marked Plaintiffs' Exhibit 12, February 16th, 1911, C. B.

MR. STRONG: A letter lated January 1st, 1903, sending certificates of stock of the Sheffield Coal & Iron Company.

The paper was admitted in evidence and marked Plaintiffs' Exhibit No. 13, February 16th, 1911, C. B.

My subscription of $15,000 was paid in four
456 amounts, by check, by my personal check on the bank against my deposit account. Against cash on deposit. I don't remember ever having met Mr. August Mann. I had heard of him in connection with another syndicate matter. I did not know of his kinship to the defendant. I became acquainted with Isaac L. Elwood during the time I was with the Illinois Steel Company, in the late 90's, I should say, I knew him. I never became acquainted with Mr. Williams, whose estate was a subscriber to the syndicate agreement. All my knowledge with respect to this syndicate, called the Blast Furnace Syndicate, and its operations,

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resulting in the formation of the Sheffield Coal & Iron Company, was derived from Mr. Edenborn exclusively.

Q. What if any knowledge did you have as to the cost to Mr. Edenborn of the stock of the United States Iron Company which he turned over in payment of his subscription?

MR. LITTLETON: I object to that as immaterial.

THE REFEREE: Objection overruled.

Exception taken by Mr. Littleton.

458

A. I had no knowledge of the value of the stock or the cost of it to Mr. Edenborn.

At the time that my last subscription or last installment of my subscription was paid, I did not know that Mr. Edenborn intended to pay his subscription in stock of the United States Iron Company. I think I first had any knowledge on the subject just before commencing this suit. I had no knowledge until just before the commencement of this action, as to how Mr. Mann, Mr. August Mann, had paid his subscription of $100,000. I did not know about it until later; until after the action was commenced. I had no knowledge of how Isaac L. Elwood paid his subscription at the time of the commencement of this action. I had no knowledge of how the Williams estate had paid their subscription. I had no information distinguishing "knowledge" from "information," on any of these matters to which I have referred, prior to the commencement of this action.

459

Q. Have you become familiar, in a general way, with the proceedings which culminated in the winding up of the affairs of the Sheffield Coal &

460 Iron Company and the organization of the Sheffield Coal, Iron & Steel Company?

MR. STRONG: Availing myself of what you said at the last hearing, Mr. Littleton, I have not produced all these records, but I simply want to show by Mr. Sim the fact that the Company went into the hands of a receiver, under foreclosure proceedings, that the property was sold and this new company was organized under the plan of
461 reorganization, as we discussed at the last hearing.

MR. LITTLETON: I said at that time I would not take any objection to the form of proof, but I do take an objection to the proof, as not admissible as bearing on the issues in this case. I understand the question calls for that evidence, and I put my objection upon that ground; that the subsequent history of the Sheffield Coal & Iron Company, its receivership, if it had one, and its reorganization, if there was one, and sale under the mortgage supporting these
462 bonds, is not material, under the pleadings, and does not bear on the issues.

THE REFEREE: I suppose that is so unless there is something in it which characterizes or sheds some light upon the original representation.

MR. LITTLETON: That is the point.

THE REFEREE: And your claim is that it does not shed any?

MR. LITTLETON: Yes.

THE REFEREE: And if it does not do that, why, then, it is wholly immaterial.

MR. LITTLETON: Of course before your Honor it does not make much difference as before a jury, because you are quite able to eliminate that as a cause, if it does not appear to you to be a cause.

THE REFEREE: I will overrule your objection and take the proof, subject to your motion to strike it out.

Exception taken by Mr. Littleton.

A. Yes.

Q. Now, will you please state as accurately as 464
you can the general course of proceedings in connection with the Sheffield Coal & Iron Company, in that respect, in the first place there was an action brought for a foreclosure, wasn't there?

THE REFEREE: What particular thing is there, Mr. Strong, in that proceeding which resulted in the receivership or reorganization that you claim bears upon the fact that misrepresentations were made in inducing this subscription?

MR. STRONG: The situation is this—

THE REFEREE: Let me ask you: Is it any- 465
thing more than this, that your claim is here that this $500,000 was to be in cash?

MR. STRONG: Yes.

THE REFEREE: And it was upon that representation and that understanding that the plaintiff made his subscription?

MR. STRONG: With other representations.

THE REFEREE: Yes; I am not speaking of that,—and that the defendant Edenborn, in fact, put in the stock and property represented by it, as his subscription, instead of

466 cash, and that as a result, his subscription not being paid in cash but by taking over this property, which you claim was insolvent, or at least not a prosperous concern, that that transaction resulted in the receivership and the reorganization?

MR. STRONG: I cannot answer that directly. The situation is this: That the old United States Iron Company, which we claim was an obsolete and unprofitable concern, was made the basis of Edenborn's
467 payment of his subscription of $500,000, by turning over the stock. Now, he states that he put in his stock at cost, and his conduct, as to whether it was fair and straightforward, was dependent upon whether he put in anything of value, and the evidence of the value of the stock, in that connection, becomes quite important.

THE REFEREE: Your claim is that they were not of a value equal to the amount of his subscription of $500,000?

MR. STRONG: Yes.

468 THE REFEREE: And by reason of the lack of money it induced this receivership?

MR. STRONG: Yes. And then, in addition to that, as bearing upon the question of the value of this Sheffield Coal & Iron stock, which they have; in estimating the measure of damages, in arriving at the damages that have been sustained, it is competent to show what the course of the Company was from the time it was organized, as gradually declining, declining and declining in its operations and in its resources until it was wiped out by the receivership. The

evidence is perfectly competent on the question of the value of this stock.

MR. LITTLETON: I am afraid I have never gotten at what the true nature of this action is and if I do, Mr. Strong dislodges it from my mind every time he undertakes to state it. You bring an action in which you say you have rescinded your subscription and tendered back your stock. You say you rescind because it was sold to you under misrepresentation; or that you have a right to rescind it, and you ask for your 470 money back. Now, if the first proposition is true, that it was misrepresented and that you did rescind and you are rightfully in court on that ground, I cannot see what all this has to do with it at all, because if the first proposition is true, you are entitled to your money back and the subsequent events, in my view of the case, do not shed the slighest light on it.

THE REFEREE: That goes to the extent as to whether it has any probative force on that original transaction. 471

MR. LITTLETON: That is the point.

MR. STRONG: But it has probative force on the question of the value of the Sheffield Coal & Iron Company's stock.

THE REFEREE: In Mr. Littleton's view, the narrow view of it, is that it does not make any difference.

MR. STRONG: The Court held in Brooklyn that that was not so; that we have got to show damage, and sustained the demurrer on that ground, and we have alleged damages, and, so far as that is concerned,

472 it is competent on the question of damages, if it is an action for damages or if it can be maintained as an action for damages, in case we do not have the right to rescind.

THE REFEREE: I will overrule the objection and give you an exception, Mr. Littleton, to the testimony.

Exception taken by Mr. Littleton.

A. The Company, soon after the commencement of this action, became financially embarrassed,
473 and there was a suit commenced after that to foreclose on the mortgage. Then a receiver was appointed for the Company, Mr. Benjamin Strong, Jr.

I do not know that he is any relative of yours. Then a plan was submitted to the stockholders for a reorganization of the Company. That plan was unsuccessful and a modified plan was sent the stockholders, or received by the stockholders. I have the original plan and the modified plan.

MR. STRONG: I offer those in evidence.

MR. LITTLETON: Objection is taken to the
474 plan or agreement for reorganization and to the modified plan or agreement for reorganization, upon the ground that it sheds no light upon the issue involved in this action, and I may add, it might operate prejudicially and unjustly to the interests of the defendant.

THE REFEREE: It is admitted for the limited purpose, Mr. Littleton, of establishing whether there is a bearing upon the question of the truth or falsity of the original representations. I overrule the objection

for the present and reserve to you the right to make a motion to strike it out.

The papers were admitted in evidence and marked Plaintiff's Exhibits Nos. 14 and 15, February 16th, 1911, C. B.

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During this period the furnaces were not in operation. The Company had ceased its operations. Under the modified plan these stockholders were offered common stock to the amount of 25 per cent. of our holding, and there were bonds, preferred and common stock. We were not permitted to take any of the bonds or preferred stock without paying an assessment; and for our holding in Sheffield Coal & Iron stock we were to be given 25 per cent. in common stock of the new company. I understand it is not worth anything now. In the foreclosure proceeding a receiver was appointed. A judgment of foreclosure was had and the property sold to the new company, transferred to the new company. I have made inquiries regarding this Sheffield Coal, Iron & Steel Company stock, the common stock. It is not listed, to my knowledge. I have inquired as to its market value.

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Mr. Strong then offered in evidence original subscription agreement with signatures. The paper was admitted in evidence and marked Plaintiffs' Exhibit No. 16, February 16th, 1911, C. B.

Mr. Strong: I offer in evidence copy of letter of the defendant dated June 25th, 1904, to the stockholders of the Sheffield Coal & Iron Company.

The paper was admitted in evidence and marked Plaintiffs' Exhibit No. 17, February 16th, 1911, C. B.

478 MR. STRONG: I offer in evidence copy of check of the defendant dated December 31st, 1902, for $101,025.

The paper was admitted in evidence and marked Plaintiffs' Exhibit No. 18, February 16th, 1911, C. B.

MR. STRONG: I offer in evidence copy of check for $70,825 of the defendant, dated December 31st, 1902.

The paper was admitted in evidence and marked Plaintiffs' Exhibit No. 19, February 16th, 1911, C. B.

479 MR. STRONG: I offer in evidence the minutes of the Blast Furnace Syndicate, signed by William Edenborn, chairman; August Mann and J. C. Walker, syndicate managers, of the meeting of June 18th, 1902.

The minutes were admitted in evidence and marked Plaintiffs' Exhibit No. 20, February 16th, 1911, C. B.

MR. STRONG: I offer in evidence agreement between the Sheffield Coal & Iron Company and August Mann, William Edenborn and J. C. Walker, acting in behalf of the syndicate known as the Blast Furnace Syndicate.

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The paper was admitted in evidence and marked Plaintiffs' Exhibit No. 21, February 16th, 1911, C. B.

MR. STRONG: I also offer in evidence copy of a communication from William Edenborn, John C. Walker and August Mann to the Sheffield Coal & Iron Company, dated December 30th, 1902, showing the stock issued.

481

The copy was admitted in evidence and marked Plaintiffs' Exhibit No. 22, February 16th, 1911, C. B.

MR. STRONG: I also offer in evidence copy of letter of the same to the same, dated December 30th, 1902.

The copy was admitted in evidence and marked Plaintiffs' Exhibit No. 23, February 16th, 1911, C. B.

MR. STRONG: I also offer in evidence copy of report of the treasurer of the Sheffield Coal & Iron Company, which was presented to a meeting of the stockholders of said Company on June 14th, 1904.

482

The copy was admitted in evidence and marked Plaintiffs' Exhibit No. 24, February 16th, 1911, C. B.

MR. STRONG: I offer in evidence statement submitted by Mr. Edenborn as to the items making up the cost of the United States Iron Company stock turned over to the Sheffield Coal & Iron Company.

MR. LITTLETON: There was a large volume of testimony taken by Mr. Strong from Edenborn, the defendant, before a commissioner, which is here, and amongst other things there is this scrap of a statement which was made by the defendant, which no doubt is correct, except that it seems to me that Mr. Strong could elucidate the point and also be more fair to the defendant if he allowed the statement made by the defendant at the time he submitted this item to him, to go in with it.

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THE REFEREE: I cannot control Mr.

484 Strong on that subject. I suppose anything you have to explain you will have opportunity to, later.

MR. LITTLETON: There is no objection, except that this is simply fragmentary, that is all.

MR. STRONG: I haven't any objection to the defendant testifying and explaining and making here the same explanation. I do not want to withhold anything.

485 MR. LITTLETON: I wanted the Court to understand that this was not unaccompanied by an explanation. That is the only statement you put in?

MR. STRONG: That is the only one, with this exception—

MR. LITTLETON: But that goes in, and now that I have called attention to the fact that it is unaccompanied by the testimony, and in order that my position may be always clear on the record, as I see it, I object to any proof as to the cost of the stock of the United States Iron Company to the

486 defendant Edenborn at the time he purchased it, being the same stock which was finally turned into the Sheffield Coal & Iron Company, upon the ground that its cost to him sheds no light upon any part of the transaction between him and this plaintiff, and that it is not within any of the pleadings. There is no allegation here that he turned it in for less than it cost him or more than it cost him. There is no complaint made that he made any money out of it.

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MR. STRONG: The allegation is that he turned in worthless stock; that he turned it in at a cost of seventy per cent.

MR. LITTLETON: The proof is that he made—and I think that statement will show, although I have not seen it—that the Syndicate Agreement recited that there was an opportunity to procure this stock at par or nearly par; that thereafter he turned it in at seventy cents on the dollar. Now, this statement follows, which I think will sustain the claim that it was at seventy cents on the dollar. That is what he paid for it. There is no allegation that in turning it in at what it cost him he deceived or defrauded the plaintiff in any way. My objection is that its cost to him is wholly immaterial, in that view of the case.

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THE REFEREE: I will receive it and give you an exception.

Exception taken by Mr. Littleton.

The paper was admitted in evidence and marked Plaintiffs' Exhibit No. 25, February 16th, 1911, C. B.

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MR. STRONG: In connection with Exhibit 19, I offer in evidence a statement as to how the check was made up.

The paper was admitted in evidence and marked Plaintiffs' Exhibit No. 26, February 16th, 1911, C. B.

MR. STRONG: I offer in evidence a list of subscribers to the Blast Furnace Syndicate, being the Syndicate in question, and payments made by each on such subscription, being the original book kept by the Syndicate managers.

490 MR. LITTLETON: I object to this as being utterly immaterial.

MR. STRONG: If we can show that they paid it in something else besides cash, it will bear on the case.

MR. LITTLETON: Although it has been passed upon by the Appellate Division already in the Hecksher case it might be proper to prove what Mr. Edenborn paid.

MR. STRONG: And Mr. Mann.

MR. LITTLETON: The fact that Mr. Mann
491 should pay his subscription in chips and whetstones, when he is not sued in this action, when he has not been made a party defendant, when there has been no attempt at rescission, when there has been no claim of fraud or deceit, when he is not in Court and when it is not claimed that Mr. Edenborn procured the payment of Mr. Mann in chips and whetstones, as the case may be, it is wholly immaterial to any claim made here.

MR. STRONG: I offer the book. In the
492 first place, I offer the entry in the book as to the payment by Mr. Edenborn of his subscription—William Edenborn, 71 Broadway, New York City.

MR. LITTLETON: As to that I make no objection.

MR. STRONG: Then I also offer in evidence, the entry in said book as to the payment by Isaac L. Elwood of his subscription.

MR. LITTLETON: That is objected to upon the ground it is utterly immaterial and cannot be binding upon the defendant Eden-

born so as to make him guilty of any fraud. There is no allegation that even if he accepted the subscription from Mr. Elwood in other than money, he is guilty of any fraud.

Mr. Strong: That is just the point. The defendant represented to the plaintiff that no subscriber should have any advantage over the other. Here these Syndicate managers, by their own books, acknowledge that they accepted from Elwood certificates of stock of the United States Iron Company as 494
representing his subscription. They acknowledge that the Williams estate was allowed to pay their subscription in stock of the United States Iron Company. They acknowledge that Mr. Mann, instead of paying his subscription of $100,000. according to the subscription paper, was allowed to pay it in land, and we claim that that is fraud.

Mr. Littleton: Let me call your Honor's attention to this. This is quite important, I think. This action is brought against the 495
defendant Edenborn, individually, for what? Fraud—for what he claims now and then, at all events, was fraud and deceit; but it actually is, on its face, a suit upon a rescission of an agreement of subscription; an action, the bringing of which I could never understand, how they could rescind between themselves and Edenborn individually—I never understood it and neither did the Appellate Division. They have brought an action against Edenborn and ignored his character as Syndicate man-

ager and have centered upon him to make him repurchase the stock which they bought. See how it works out. Having alleged that and alleged rescission, they bring evidence now to show that the Syndicate managers, who are not sued in this case and who are not legally in this case as Syndicate managers, except by recitals; that the Syndicate managers were guilty of wrong in allowing Elwood to put in property for what they believe should have been paid in money. That is the other objection. The third one is that if the stock of this concern was turned in—such as Elwood had—instead of the money, and it was turned in at a valuation which was fair or at a truthful valuation to the Syndicate, and the Syndicate Agreement simply provided for the purchase of this particular property, and the plaintiff well knew that, having examined it carefully, he knew that they had to acquire the property, it would have been identically the same as if Elwood had sold his stock for money to a third person and paid his money in for the subscription and the third person had turned his stock in. What bearing the manner of payment of Elwood can have, I cannot see.

MR. STRONG: It was an advantage that he got over the others.

THE REFEREE: Suppose they all got an advantage over the plaintiff and that they were permitted to put in other property than cash, and it was received by the Syndicate managers, could that fact be laid

hold of as a basis to charge liability upon Edenborn?

MR. STRONG: Yes.

THE REFEREE: Wouldn't you have to go a step further? This is the only doubt I have in my mind. This representation, as testified to by the plaintiff, is to the effect that each one of the subscribers was to put in cash.

MR. STRONG: Stand on an equal basis.

THE REFEREE: Dollar for dollar, and stand on an equal footing. 500

MR. STRONG: No advantages to any.

THE REFEREE: If it appears that at that time it was known by Edenborn that the parties who subscribed would not put in in cash but would put in in property, why, then, I think the testimony would be admissible; but unless it is connected in some form with the representations which were made at the time the subscription was made, then I do not see how it would be admissible, because he cannot be held responsible, in this action, for the action of others. Nor could he be held responsible 501 if some one of the subscribers subsequently negotiated with the Syndicate managers and induced them to accept property instead of money; and as to the stock that was turned in of the property which was to be taken over, of course that was within the fair contemplation that it would be acquired, and the only question that could arise upon that is whether the stock was turned in at the same price at which the Syndicate acquired the property, in the interest of the other stockholders, because

that would be equivalent to money; and if you cannot show the connection between Mr. Edenborn, the defendant,—that he knew at the time he made the representation that actual cash on the part of some of these subscribers; no matter who it was or what the property was, was to be in property instead of in money, then I think you may show it. The account, standing alone, does not establish that.

MR. STRONG: That of course I cannot do all at once.

THE REFEREE: Well, we will receive this upon the understanding that you will connect it hereafter.

MR. STRONG: There is another view of it that of course I do not want your Honor to lose sight of. His representation was positive that there should be no advantages given to one over the other; that all should stand upon an equal footing. Now, without going further into that, it is a very different thing from a man turning over stock in payment of a subscription from turning over money. In the first place, you take those that are turning over money, putting in actual cash, they have to raise that money, they lose the interest on that money, and the Syndicate gets the advantage of earning the interest on the money when it is in the Syndicate managers' hands. Now, when a person puts in old stock that he has on hand, he is not losing any interest, he is not being put to the expense and trouble of raising any money, and the Syndicate itself is not getting any interest on the payment thus made in stock. Now,

there is a serious loss to the Syndicate in the first place, if it was allowed to be done to a very large extent, why, the loss would be proportionately large. In that respect the Syndicate subscribers lose by just the extent to which interest is not earned on the amount that is paid in. The subscriber who does thus put it in profits just to the extent that he does not put in money. There are two very serious advantages which I am frank to say I regard as very important elements in the case, as showing 506 the advantage that some of these subscribers got over the other subscribers; and the disadvantage that accrued to the subscribers to the Syndicate by not having all these subscriptions paid in as they had.

THE REFEREE: All that is true; but this action here is brought against Edenborn and, as I read that complaint, I am inclined to think your characterization of it is a correct one. It is that it is an action for fraud and deceit. It may involve an attempt to rescind but it is purely an action to recover money, and that is the demand 507 for judgment, and all the facts are set up. Supposing at the time Mr. Edenborn solicited this subscription from Mr. Sim he understood that every subscriber would pay in in cash, including himself, but subsequently, when the payments came to be made, difficulties were met and the Syndicate managers overruled Edenborn and accepted payment otherwise than in cash; could you then maintain an action based upon the theory of fraud?

508 MR. STRONG: That presents another situation.

THE REFEREE: Isn't that just where you land?

MR. STRONG: No, because there is no evidence that he was overruled.

THE REFEREE: The difficulty is that you do not make that connecting link. You cannot presume, you have got to show that Edenborn knew at the time when the subscriptions were made, that they were not to be made in cash.

509 MR. LITTLETON: One other suggestion. The Appellate Division in Brooklyn——

MR. STRONG: They have not agreed on anything.

MR. LITTLETON: This is the opinion of The Court of which Judge Hatch was long a member, and it is written by one of the most rugged men that ever sat on that bench.

MR. STRONG: Are we to point out the fact that two of the Judges did not concur?

THE REFEREE: I have read it.

510 MR. LITTLETON: I understand that the prevailing opinion of the Court was written by Mr. Justice Woodward, and in that prevailing opinion, which is binding.

THE REFEREE: I will permit you to offer this proof upon the basis of your subsequently connecting it with knowledge upon the part of Edenborn or facts from which knowledge is fairly to be inferred, because you see you are charging him with fraud. Now, that has got to be proven, and that might all have been done and he may not

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have been responsible at all, and he may have been responsible for the whole of it.

MR. STRONG: I get the point that your Honor suggests. I offer the same entry as to Isaac L. Elwood.

THE REFEREE: You propose to connect it, Mr. Strong?

MR. STRONG: Yes, I will do that.

THE REFEREE: I will receive it, with that understanding. Mr. Littleton can protect himself by moving to strike it out, if you do not.

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MR. STRONG: I also offer the entry as to August Mann.

MR. LITTLETON: You do not promise to prove that Mr. Edenborn knew that August Mann was going to turn in that property at the time?

MR. STRONG: I do intend to, and if there was any fraud in the other thing, it was the grossest kind of fraud, in my judgment, to allow August Mann, one of the Syndicate managers, to sell to the Syndicate his own property in payment of his own subscription.

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MR. LITTLETON: The whole point of it is when it suits Mr. Strong's purpose—

MR. STRONG: Is there an objection?

MR. LITTLETON: Yes, there is an objection. The point I make is that when it suits Mr. Strong's purpose he tries the case as if he were suing the Syndicate managers instead of Edenborn, and then when it suits him he tries it as if he were suing Edenborn and not the Syndicate managers. Mann was one of the Syndicate managers

514 himself. Mann was responsible for his own conduct in the matter, and if Mann paid in his subscription in other than money, if he put property in, surely we are not to be held responsible unless it was mismanagement of the Syndicate, in some way, and we, as trustees or acting as trustees, mismanaged it.

THE REFEREE: That is true, but it is also true if Edenborn, at the time he made these representations, then knew it was not
515 to be paid in money, then because the Syndicate managers may also be liable, would not operate to exonerate Mr. Edenborn. I think I will take the testimony. It may turn out you are entirely correct and it may turn out differently. It will depend upon what proof is offered. I will give you an exception and you may proceed, Mr. Strong.

Exception taken by Mr. Littleton.

MR. STRONG: My view of it is that—

THE REFEREE: I have got your view.

MR. STRONG: Let me throw one more
516 point out to you. My view of it is that the time of the fraud should not be measured by the time when the subscriptions were made, but the time when the subscriptions were paid. That is the time to measure it. A man may make his subscription at one time to be payable at a future time, a considerable time in the future, and if between the time he made the subscription and the time he made the payment he concocted the idea in his own mind that he could get up this way of paying his sub-

scription, why, the fraud relates to the time when the subscription was paid, not when it was made. 517

THE REFEREE: That may be. Suppose at the time he agreed to pay it, he did not have any cash?

MR. STRONG: Now, if he could show some excuse for it—

THE REFEREE: It is not a question of his not showing his excuse, it is a question of your making the proof.

MR. STRONG: I merely thought I would state the point to you. 518

THE REFEREE: I have got the point.

MR. STRONG: Shall I read these items in?

MR. LITTLETON: I think I shall offer the whole record, inasmuch as you have offered a part of the items.

MR. STRONG: Do you want the whole book in?

MR. LITTLETON: Yes, let us have it in.

The book was admitted in evidence and marked Plaintiffs' Exhibit No. 27, February 16th, 1911, C. B. 519

MR. STRONG: I offer in evidence the ledger of the Blast Furnace Syndicate, so far as relates to this entry.

MR. LITTLETON: This is taken subject to the same objection and exception, I take it —it is only proof in another book of the same fact?

THE REFEREE: Yes.

Paper admitted in evidence and marked Plaintiff's Exhibit 27-A, February 16, 1911. C. B.

520 MR. STRONG: I offer in evidence letter of William Edenborn dated August 27th, 1909, to W. P. Palmer, President, American Steel & Wire Company, Cleveland Ohio.

The paper was admitted in evidence and marked Plaintiffs' Exhibit No. 28, February 16th, 1911, C. B.

MR. STRONG: Plaintiffs' counsel offers in evidence statement as to the amounts making up the check for $101,025.

The paper was admitted in evidence and
521 marked Plaintiffs' Exhibit No 29, March 2nd, 1911, C. B.

MR. STRONG: I offer in evidence the minutes of the meeting of the Managers of the Blast Furnace Syndicate, held August 14th, 1902. At which a resolution was passed instructing the Chairman to issue and call for 35 per cent of the subscriptions.

The minutes were admitted in evidence and marked Plaintiffs' Exhibit No. 30, March 2nd, 1911, C. B.

MR. STRONG: Also a similar resolution at a meeting held November 11th, 1902.

522 The paper was admitted in evidence and marked Plaintiffs' Exhibit No. 31, March 2nd, 1911, C. B.

MR. STRONG: I also offer in evidence the minutes of a stockholders' meeting of the United States Iron Company held September 19th, 1902.

The minutes were admitted in evidence and marked Plaintiffs' Exhibit No. 32, March 2nd, 1911, C. B.

Q. Mr. Sim, when you received and read the Syndicate agreement the Blast Furnace Syndicate

agreement, Exhibit 1, I think; and at the time you signed that certificate, state whether or not you believed the statements that were contained in the same. 523

MR. LITTLETON: The objection I make to that is that this suit is based upon misrepresentations and false statements amounting to fraud and deceit on the part of the defendant Edenborn. It does not appear that the Syndicate agreement was his personal representation to Mr. Sim.

MR. STRONG: Yes, he handed it out to Mr. Sim, and prepared it and was promoting it. 524

THE REFEREE: Objection overruled. I will give you an exception.

Exception taken by Mr. Littleton.

A. I did believe the statement.

I did rely on the truth of the statements contained in that document. I had no knowledge or information to the contrary of those statements contained in that document; believing in and relying on the statements made by Mr. Edenborn I signed the same. I relied on these statements contained in that document. I signed the same believing in and relying on them. 525

CROSS EXAMINATION by Mr. Littleton:

I said that I had been in the steel business since 1885. I started with the Joilet Steel Company in that year. Just a junior position, stenographer. I continued as stenographer until after the Illinois Steel Company was formed, which bought out the Joilet Steel Company, and in February,

526 James Sim.

1890, about a year after the formation of the Illinois Steel Company, I was appointed assistant secretary of the Illinois Steel Company. The Joilet Steel Company was located at 11 Pine Street, and the Illinois Steel Company started in at 46 Wall Street. I continued as assistant secretary until the Federal Steel Company was formed; the Illinois Steel Company going out of existence at that time. Up until the time I went out of the Steel Corporation I was secretary of the Illinois Steel Company, From 1890 to 1902, but
527 in 1898 the Federal Steel Company was formed. The business of the Illinois Steel Company was manufacturing steel—steel manufacturers. Its plants were at Joilet, Illinois, Chicago and Milwaukee. Its authorized capital was $50,000,000; issued capital $18,650,000. Mr. A. J. Forbes-Leith was the first president of it, and then Mr. J. C. Morse succeeded Mr. Forbes-Leith, and after that Mr. John W. Gates succeeded Mr. Morse.

As secretary of the Illinois Steel Company my duties generally were that I was in charge of the records in the New York office, and any work that I might be charged with. I served under John W.
528 Gates as president; the Federal Steel Company was formed in 1898; it comprised after its formation the Illinois Steel Company, the Minnesota Iron Company, the Lorain Steel Company, the Elgin, Joilet & Eastern Railway. It took over the Illinois Steel Company; in this larger Company, known as the Federal Company I took the position of Second Vice-President. I was located at 71 Broadway. E. H. Gary, the present president of the U. S. Steel Corporation—the present chairman of the Executive Committee, was president of the Federal Steel Company. I continued as sec-

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ond vice-president of the Federal Steel Company until I left the Steel Corporation, in 1902. I had gone with the United States Steel Corporation when it was formed. The United States Steel Corporation comprised after its formation the Federal Steel Company, the Carnegie Steel Company, the American Steel & Wire Company, the National Steel Company, the American Bridge Company came in a little later; the American Steel Hoop Company, and some smaller companies; they may not all have come in at the time of the formation; but came in about that time. I had no 530
official title with the United States Steel Corporation when it was formed; the character of my employment was that I was still assistant secretary of the Illinois Steel Company, and second vice-president of the Federal Steel Company. I was located in the treasurer's office of the United States Steel Corporation. I remained with them until October, 1902, and then I left them. I first met Mr. Edenborn at 71 Broadway, I should say in the late 90's. I had known of him for a number of years prior to that time. When I first knew of him he was engaged in the wire business. I think
the name of it was the Consolidated Steel & Wire 531
Company. The United States Steel Corporation took over the successor Company. I do not know where Mr. Edenborn's office was during these years prior to the formation of the Federal Steel Company; I think it was in Chicago. I held stock in the Illinois Steel Company and the Federal Steel Company and the United States Steel Corporation. I had made a study of the steel and iron business. I might say I was engaged in studying the steel and iron business from the time of the formation of the Illinois Steel Company—

532 that is for twelve to seventeen years, starting in with the Joilet Steel Company. I took the steel magazines. The leading magazines are known as Iron Age; the Mining & Engineering Journal; Iron Trade Review. I read the Iron Age regularly. It was in the office; it is a weekly paper. I must have read it from the time I started in the steel business up until the time I left it and since. I am secretary to Lord Leith of Fyvie. I immediately took that position after 1902. Lord Leith of Fyvie was at one time the president of the
533 Joilet Steel Company and the first president of the Illinois Steel Company; as such president his name was A. J. Forbes-Leith, as president of the Illinois Steel Company, and Alexander J. Forbes as president of the Joilet Steel Company. He is not identified with the steel business now; he resides on the other side. He hasn't any official connection in these steel concerns.

I keep posted on the steel business. When I was presented with this proposition, my attention was called to it by Mr. Cluff. Mr. Cluff is now manager of sales in New York of the Illinois Steel Company, the Carnegie Steel Company and the
534 Tennessee Coal & Iron Company. I have known Mr. Cluff since 1895. And during that time his business has been the steel business. He was associated with me since 1895 up until 1902. His position was General Eastern Agent of the Illinois Steel Company. And afterwards in the Federal. His position was still General Eastern Agent of the Illinois Steel Company. And after the United States Steel Corporation had taken over those companies he was Assistant Manager of Sales of the Carnegie and Illinois Companies. Now he is manager of Sales of the Illinois Steel Company

and Carnegie Steel Company and Tennessee Coal & Iron Company. One of the causes of action, which I present here is a cause of action which he has. He assigned his claim to me in 1906. After the Hecksher trial. My attention was first drawn to this proposed purchase of the Iron Company by Mr. Cluff some time between the 15th of April and June 30th, 1902. I did not know of the existence of the U. S. Iron Company until the Syndicate agreement was presented. I did not know there was such a company as the United States Iron Company. I had never come across it at any time in my reading. My acquaintance with the steel business had not brought it within the range of my knowledge. Mr. Cluff came to me at this time, in April, 1902, and had a conversation with me. He told me that he had seen—that he had met Mr. Edenborn, and Mr. Edenborn had recommended this investment. The Blast Furnace Syndicate, investment in some company that was to be formed. And he told me that he had spoken about me to Mr. Edenborn and Mr. Edenborn had extended an invitation for me to call at his office. That is the substance of it. I don't remember that he told me about the United States Iron Company. I did not make any inquiry of Mr. Cluff regarding what it was. Mr. Cluff referred me to Mr. Edenborn for information. Mr. Cluff did not give me his advice regarding the investment. Within a day or so after the conversation with him I saw Mr. Edenborn at Mr. Edenborn's office, 71 Broadway. I had met him before that time. I knew him. I knew him at that time. He was a member of the Executive Committee of the United States Steel Corporation and a director in the United States Steel Corporation. And as such I

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538 had met him in the course of my business. I told him that I was calling there in connection with Mr. Cluff's conversation and on Mr. Edenborn's invitation. I said in my testimony to my counsel that "Mr. Edenborn told me that this was a plan to form a blast furnace company and that they had an option on some iron ore property in the south and coal properties, and that they proposed to form a blast furnace company which would be a small company, in the family, as it were." That is about correct. When he told me that he had an
539 option on some iron ore property in the south, I think I asked him where the iron ore property was. I think he told me in Alabama. He told me that they were doing a little business; that they were doing some business and that it was a paying property. I didn't ask him if it was property which was under a more or less nebulous option, or property which had been formed into a corporation. He told me then—the name "The United States Iron Company." He just said that this was an option to acquire the United States Iron Company. I think he told me the United States Iron Company was located in Alabama. I did not
540 ask him where it was incorporated. I don't recall asking him what its capital was. I did not ask him who its officers were. I think something was said about the extent of the ore property. I don't recall asking him any questions. I did not ask him what its liabilities were. I don't recall asking him its financial condition. No, he produced the syndicate agreement at that time. There was at that time, just a general conversation; about the formation of the company and the status of the subscribers and the subscription, about coming in on the—about the subscribers coming in

to the extent of their interests or in proportion to their interests on the same basis. I said in my testimony, "How about the subscriptions, and he said that he himself had subscribed $500,000 in cash." He told me that. I looked at the subscription. It was not the original I saw. It was typewritten, and the other amounts he said had been subscribed. He showed the names. I remember a few of the names, because I have seen the agreement since. Mr. Gary and Mr. Walker. I don't remember that he said that the syndicate agreement would give me the details of the information about the plan. He gave me the syndicate agreement to read. He said we would all come in on the same footing. That every man's dollar would be put up against every other man's dollar. That there would be no commission to any of the underwriters. That the property was a paying property. I don't remember that I made any particular inquiry about anything because I relied on the statement that he made to me. My counsel has just asked me and I have just said I also relied upon the syndicate agreement. That is so. I saw Mr. Cluff soon after I left Mr. Edenborn on the occasion of this conversation. I wanted to consult with Mr. Cluff. I had several conversations with him, regarding the thing as a whole. I wasn't interested in any other way except to find out whether I wanted to go in it or not. My conversations with him were not altogether to determine whether it was a good thing to be in. They were to get his views and put his views along with mine. Our conversations were aimed at whether it was a good thing to do. I went over that syndicate agreement very carefully? I read it myself carefully. I presume

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544 I went over it carefully with Mr. Cluff. I presume Mr. Cluff and I went over it together. Mr. Cluff had some experience in the steel business. I wanted his judgment. He called it to my attention, yes. He was trying to determine also whether to go into it or not.

This syndicate agreement says, "Whereas an opportunity is afforded to acquire, for a cash consideration, the ownership, control and possession of the United States Iron Company of New Jersey, at par, said Company being capitalized at $1,-
545 000,000, and being the owner of valuable iron ore mines in operation and valuable lands located in Alabama and Tennessee"—I read that. I don't recall asking how the opportunity was afforded to acquire this property. I don't recall that. I asked Mr. Edenborn how the opportunity presented itself to acquire this property. I don't think I asked him how he was going to acquire the ownership of this property. I did not discuss with Mr. Cluff how he was going to acquire the ownership of it.

Q. Did you ask him how he was going to ac-
546 quire control of it, Mr. Edenborn? A. He was going to acquire control by payment of cash. They were going to buy it.

I don't recall just exactly making the inquiry, definitely. I was confronted here, in the very first opening paragraph of this syndicate agreement, with the statement that an opportunity was afforded to acquire control of this United States Iron Company. It didn't occur to me that I would like to know who owned the United States Iron Company. I do not think it occurred to me to suggest to Mr. Cluff as to who might be the owner of it. Mr. Eden-

born made the statement that he knew all about it, had subscribed $500,000 in cash. If it did occur to me to make any inquiry as to how much the stock was worth, I don't think I did make any inquiry. I did not make any inquiry as to how much the stock of the United States Iron Company was worth. I did not look for a market to see whether it had any market. I don't think I searched any place for a local market to ascertain how much the stock of the United States Iron Company was selling for. I was in the steel business and had access to statistical steel matter, 548
but the United States Iron Company was not a company like the Illinois Steel Company listed on the Exchange, or anything of that kind. I had data connected with my great machinery which I had access to, from which I could have ascertained about the United States Iron Company. I did not make any inquiry about it except in a general way. My counsel asked me if I had known that Mr. Edenborn owned an interest in this stock, or had control of it, whether I would have gone into it or not, and I said I would not have.

I don't remember exactly what the question 549
was. I read this over very carefully. Referring to the thirteenth paragraph of this agreement—to which you call my attention, "The Syndicate managers shall not be liable for any error of judgment or for any mistakes of law or fact; nor shall they be liable for any act or omission while endeavoring, in good faith, to carry out the purposes hereunder, according to their judgment; and nothing herein contained, or otherwise, shall constitute the parties hereto partners or shall render any of the subscribers liable to contribute

more than his several and proportionate amount, as herein provided, or shall prevent any of the parties from contracting with each other with reference to any of their respective interests." If that is in the syndicate agreement, I have read it. I relied on the syndicate agreement. I relied on the whole thing.

I did not know the value of the United States Iron Company's stock. I do not know whether I now know what its value was at the time I subscribed or not. I have a better idea now than I had then. I do not know the value.

I had no reason to believe at the time that the stock was not worth seventy. I understood that the Syndicate agreement provided that it should acquire the stock probably at par. I think that was so stated in the agreement. I had no reason to suppose at that time that it was not worth par.

I knew that in acquiring the United States Iron Company you had to acquire it by the purchase of the stock by paying cash. I knew that we had to put in cash. I did not think about buying the stock.

I understood that you could not buy United States Iron Company like you could a building with a deed, that you had to buy it by buying or getting control of the stock. I remember my answer that "If I had known that Mr. Edenborn owned the controlling interest in the Company selling that to us, and that he was not putting up five hundred thousand in cash, I certainly would not have signed that agreement." It would have made quite a difference. Between putting in $500,000 in cash and turning over the stock in the Company. I think it would have made quite a difference. Putting in cash as against stock.

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We started out, as I understood it, to acquire the United States Iron Company, but I did not know that Mr. Edenborn was simply turning over the property to us. It made quite a good deal of difference to me, in so far as not turning in cash, putting in a new subscription from the beginning, $500,000 in cash. If it had been cash the five hundred thousand would have gone for stock. The five hundred thousand in cash would have gone into the treasury of the Syndicate, and from there, supposing the stock had not been Mr. Edelborn's, had been yours, for instance, it would have gone 554
to the owners of the stock, and the stock would have gone to the Syndicate. So the five hundred thousand in cash would have passed to the owner of the stock. It would have gone into the Syndicate first, of course, and then out, I presume, to acquire this particular stock. The difference that it would have made to me is that it would have suggested to me that Mr. Edenborn was selling us his own property. I say in my complaint that Mr. Edenborn was guilty of fraud and deceit and that that fraud and deceit resulted in damage to me. The damage resulted in a loss that I have sustained 555
through going into this thing on Mr. Edenborn's invitation and recommendation. The difference it would have made to me that Mr. Edenborn owned the stock if the stock was worth seventy, is that I would have regarded it as an entirely different proposition, Mr. Edenborn would not have had to raise $500,000 in cash—I understood, he told me that he was putting in $500,000 in cash against the cash of the other subscribers, that he had investigated the thing and was satisfied with the value of it, and his money

556 was going in with the money of the others; an entirely different proposition to my mind.

I did not know whether the stock was worth 70 at the time Mr. Edenborn recommended the investment. He was a big man in the Steel Corporation; he was one of our directors. You asked me if I knew anything to the contrary that the stock was worth 70 at that time and I stated I did not. I relied on Mr. Edenborn's statement.

Assuming for the sake of the question, that the stock was worth 70 it made a great deal of dif-
557 ference to me whether he put up five hundred thousand in cash or put up five hundred thousand dollars' worth of the stock. Simply the difference of my putting up cash to buy his property and not knowing what he was doing he withholding the information that he was the owner of that property. I was injured by it by the loss of my money.

Q. If that caused you to lose your money, surely; but how were you injured by the fact that the stock, if it were worth seventy, was put up instead of $70 worth of the same thing? A. I do not think I can answer you in any other way than
558 the way I have done.

I say now that to the best of my information the stock was not worth seventy then. I do not think I said there were any disasters, I do not think I testified to that, I don't know that there were any other succeeding causes that brought about disaster to the Company, subsequent to the time when this stock was purchased? The cause of the Company's failure was that the price of iron declined. They did not have enough money. There were a number of causes of the Sheffield Coal & Iron Company going into the hands of a receiver. Perhaps the Company did

559

not get the management that it should have had. And they bought these furnaces and got short of money, they were altering and repairing furnaces which they bought from the Tennessee Coal & Iron Company, and the year 1903 was a low year in the steel business, and 1904. I do not think I can state any more now. I was not an officer of the company. I knew very little about what they were doing. I have since had an opportunity to go through the old trial, or to be familiar with the fact that Hecksher sued Edenborn. I have prepared this case. I am suing now to re- 560
cover for this fraud and deceit. I think in a general way I have about covered the ground and given all the reasons that I am able to give for this Company going into the hands of a receiver. I took over the assignment of these other causes of action in 1906. I did not attend the trial of the case of Hecksher against Edenborn. I had Counsel, Mr. Strong's son, attend it in my stead. I had him attend the trial of Hecksher against Edenborn to ascertain the facts in this whole subscription business. I do not think I got a copy of that record. I have not
read all of the testimony in that case. I do not 561
think I have read the opinion of the Appellate Division. I do not think it has been read to me. That decision I did not pay very much attention to. I knew there was a decision, but I did not read it over. I was told about it. I was told that a decision—that there had been a decision in which a majority of the judges decided, or reversed the decision of the former court. I did not examine that. I did not buy these other causes of action. They were just assigned to me to bring this suit, transferred to me. The Company had

562 ceased operations I believe at that time. I am not quite sure. I do not think it had gone in the hands of a receiver at that time. When I took these causes of action I meant to bring suit on them. and on my own. I was in possession of all the facts, at that time that had come to my knowledge on which my suit was based, or to be based. But the Company was not in the hands of a receiver at that time. I claimed the fraud and deceit at that time. When I acquired or took over these other causes of action I then claimed that the
563 fraud and deceit had been practised against me.

I took these others over knowing that the claim was that fraud and deceit had been practised in those cases. And I brought an action on them with that knowledge. Of course, I do not claim to have been deceived in any manner or to have been defrauded in these other causes of action myself. Only in my own case. As to the other causes of action I know nothing about them except what I have been told. I think it was in the summer of 1906 that I learned that there was some trouble with the company, coming back
564 from an annual meeting of the stockholders of the Sheffield Company at Jersey City, so that that fixes in my mind that the Company was not in the hands of a receiver at that time. At the meeting of the stockholders the usual statements were handed around. I had owned my stock up to that time, from the time of payment in 1902—four years.

I had asked for a statement of the Company's condition during those four years. I think I got a few statements at the annual meeting. On one or two occasions that was; I do not think we got that statement every year. I ascertained from

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that statement the earnings of the Company. I cannot give you the figures at the moment. I have, I think, the annual report for the year ending June, 1906. I did not have a dividend in those four years. The stockholders were not insisting on a dividend. We were expecting one. We always expect something of that kind and hoped for it. During part of the time the Company was operated at a loss and part of the time at a profit.

I cannot give you the amount of the loss, but in the commencement of the Company's career my recollection is that there was a deficit. Later 566
on there was a surplus shown, I believe, not very large. At this stockholders' meeting in 1906 I learned something which was rather disturbing. Not so much about the Company's condition, the Company was running down, but there was a suspicion, without anything to substantiate it, that we—that Mr. Edenborn had unloaded his property on us and that we were saddled with it. I do not think I had any suspicion of it before I began to see the Company running down. I think that information that he had unloaded his property came out after sending to the Court. I did 567
not learn it at the stockholders' meeting. I do not think I learned anything there at the meeting beyond the statement of the Company. I do not remember now the figures that statement of the Company showed as to the Company's condition. I forget whether there was a profit or a loss at that time. I did not begin to complain of any deceit or fraud until after Hecksher had begun his suit. I had no basis for it before.

The Hecksher suit and the testimony in that case disclosed to me the basis for what now is my

568 suit or action. I found out nothing in the Hecksher case about the impairment of the value of the property of the old United States Iron Company. I found out that Mr. Edenborn had misrepresented to us at the time we made our subscriptions. He did not state that he was—that he owned the United States Iron Company, he stated that he was to put in $500,000 in cash; every man did not come in on an equal basis. I also learned that there were special advantages to some. Special advantages in putting in prop-
569 erty instead of cash. Mr. Edenborn put in property instead of cash. That was an advantage to Mr. Edenborn which I did not participate in. He said, "We are all getting in on the same basis." He said that every man would put up his dollar against everyone else's dollar, that there would be no special advantages to any. That we would all come in on the same footing, that the Company was organized in good faith, that it was a paying property, the United States Iron Company was a paying property, and Mr. Edenborn being a director in the United States Steel Cor-
570 poration, I had absolute reliance and faith in what he stated to me.

I said that I found out in the Hecksher case that Mr. Edenborn had not disclosed the fact that he was the controlling owner of the stock in the United States Iron Company, and that there were other special advantages. I have said that the special advantages were that he paid in stock and not cash, that was one of them.

Other advantages were that Mr. Mann, one of the—put in property instead of cash. We found out that we were not on the same footing. Those are the special advantages to which I referred. I

do not know whether the property that Mr. Mann put in was less in value than the amount of the subscription. He put in property and not cash. I believe the stock that Mr. Edenborn put in was largely less in point of value at the time he put it in than cash, from the earnings of the Company which I have seen. 571

I know the Iron Company, whose stock he had put in, has paid a dividend. It paid a dividend out of capital, I know that now. I said it paid it out of capital. I am speaking now from the books. I have seen the books, and I have figured it out that it comes from capital. I do not remember that I heard anything in the Hecksher case about the stock of the old Iron Company being worth less than seventy. I do not know that in the Hecksher case it was not even claimed that the stock was worth less than seventy at the time of the transfer of the stock to the Syndicate. I think in the Syndicate agreement we got some outline of what the United States Iron Company owned. It owned some ore land in Alabama, and some coal lands, I believe, and limestone property. 572

I forget whether it was in Tennessee or Alabama, Virginia or some place. I think that is about all. I do not know what the value of the lands owned by the United States Iron Company was at the time the Blast Furnace Syndicate took over this stock. I do not know now what the value was. I think the capital stock of the United States Iron Company was $900,000. I do not know whether the property that it owned was worth less or more than that $900,000, speaking from my knowledge. I do not know whether it had any debts at the time. I do not recollect that at the time I bought my stock there were any debts 573

574 James Sim.

of the United States Iron Company that I have been able to find. I know that later on, after the Sheffield Company was organized, and I had my stock and all the others had their stock, and the Company got in need of money, I know there were some bonds issued. I forget the amount now. I do not know how much Mr. Edenborn put up at that time. I don't know that he did put up. I do not know who took those bonds. I do not know that Mr. Edenborn took them. I don't know how much money he put up after the Sheffield Coal &
575 Iron Company had been organized, to relieve it of its distress. I never learned. I do not think I have ever inquired. I realize, in saying a man practised fraud and deceit on me that that is a serious sort of charge. The transactions in which I say that your client, Mr. Edenborn, practised fraud and deceit on me are that Mr. Edenborn did not disclose to me at the time I was in his office that he owned the controlling interest in the United States Iron Company, or that he held any interest at all. He stated that every man would have the same rights according to the amount of
576 money invested by each, that the Company was organized in good faith, that every man was putting up his dollar against every other man's dollar, that he had subscribed $500,000 in cash and that others had subscribed in cash; that there would be no advantages to anyone. I think that is about all. When I say that others had subscribed in cash, I mean by that that the particular deceit in that statement was that Mann was permited to put in property. I found out afterwards that there were others who were putting in property. The Williams Estate put in property,—United States Iron Company stock. They did not

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put up cash, also Elwood. I do not remember anybody else for the moment. I have now stated the particulars in which I say he practised fraud and deceit on me. And that is all I can sum up or recall now.

MR. STRONG: I offer in evidence the ledger of the Blast Furnace Syndicate.

The paper was admited in evidence and marked Plaintiff's Exhibit No. 33, March 21st, 1911, C. B.

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THOMAS P. ALDER, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Strong:

My name is Thomas P. Alder. My business is Treasurer United States Steel Products Company. I have been such since November 1st, 1903. Before that time I was Assistant treasurer in New York, American Steel & Wire Company of New Jersey. Without going 579
into all the positions I occupied, I have been identified with the wire and steel business for twenty-eight years. I have known Mr. Edenborn, substantially twenty years I would say. I became acquainted with him along about 1890 or 1891. He was the principal owner of two of the companies that I was employed by. I was an employee in a company in which he was, I believe, the largest individual stockholder. He was a member of the executive committee of the American Steel & Wire Company of New Jersey. Before this, when

I was working in these companies he had some official position, I think, in each one of the companies. And I was an employee. A subordinate of his away down the line. During my intercourse with Mr. Edenborn I had every confidence in him. I believed anything that he would tell me. I looked upon him, with his success in life and the permanent position that he held, as being a man of business integrity, one in whom I had a right to have full confidence. That confidence in him and trust in him continued during all the time that I knew him down to the time and after I had acquired knowledge of the Blast Furnace Syndicate. At the time that I heard of the Blast Furnace Syndicate, I was assistant treasurer in New York of the American Steel & Wire Company of New Jersey, and at or about that time I was trustee for some New York State properties owned by that Company. Mr. Edenborn had been a member of the Executive Committee of the American Steel & Wire Company, and a director, and I believe the largest individual stockholder. I first acquired knowledge of this Blast Furnace Syndicate at about the time it was contemplated, that is at the time it was formed. In 1902, April, 1902. During that year. I could not say definitely from whom I acquired the information, because I heard of it from several sources prior to the time that Mr. Edenborn spoke to me himself regarding it. Mr. Edenborn spoke to me about it along in the late spring or early summer of the year 1902, I should say. He called it the Sheffield property, I believe.

Q. Well, now, what did he say to you about it?

MR. LITTLETON: The testimony of this witness is objected to, regarding any repre-

sentations made to him or misrepresentations made to him by the defendant Edenborn to induce the purchase or to facilitate the sale of stock of the Sheffield Coal & Iron Company, upon the ground that this witness bears no relationship in this action to Mr. Edenborn, he is not suing here for fraud and deceit, and is not a plaintiff in the action, and he cannot dispose of his action for fraud and deceit by assignment to Mr. Sim so as to make it enforcible through him. 584

THE REFEREE: Would not the testimony be competent independent of that, Mr. Littleton, as showing representations as to the same subject made at about the same time, as characterizing the other?

MR. LITTLETON: It might if it is offered on the ground of contemporaneous representations or misrepresentations, if it is claimed, but I do not understand that it is offered for that purpose, it is offered distinctly on the ground that all of these fraud and deceit actions other than Mr. Sim's have, by these gentlemen, been assigned to him as a single solitary claimant. 585 I claim that a man cannot buy a fraud and deceit action.

THE REFEREE: Objection overruled.

Exception taken by Mr. Littleton.

He told me that there was a plan to acquire certain properties for cash and form a company for the manufacture of pig iron, that the basis on which everyone was coming in was cash, that everyone would be paying cash, and they would have equal rights in the proportion to their pay-

ments; that on account of it being a strictly cash proposition it would be a proposition that would be remunerative, that it was a thing that I ought to take advantage of as it would be an opportunity of a life time, that there would be no advantages to anyone in connection with it, everyone would be on the same footing, and that he thought that I really ought to have an opportunity of participating in such a business proposition. As to the kind of property that they were going to take in he said that only first-class properties
587 were going in, that were good paying things, every one, and as they would only take them in for cash they would get them right down at the bottom, and everything would work out to the subscribers' interests and be very remunerative. I told him that I did not have the money to go into the thing and he said it would be a pity if I could not get some of it.

He told me that if I had some of it I could put it away and forget that I ever paid for it, the income would be so large that it would be something that I need never worry about, I could forget all about it. I do not think that at that
588 time there were any earnings. In subsequent conversations he spoke about earnings. On subsequent occasions he spoke to me a number of times with reference to these matters that have been enquired about, and on a number of occasions I told him that I simply did not have any money to go into it, and later on, why, he told me that the Company was really making earnings before it was really formed. After a number of conversations I had told him that I could not raise the money to do it. One day in the latter part of the year, along towards December, in the course of

a conversation he told me that he had just had a letter from Dr. Leslie Ward, of Newark, who had been one of the directors of the Wire Company, and that owing to the difficulties that were coming up in connection with the Fidelity Trust Company and the Prudential Insurance Company matters, he would be unable to make his payment of the final allotment or final installment on the subscription, that it was $10,000, and that it would be the last chance I would ever have to get in, and he talked with me about the benefits that I would have by participating in it, the earnings 590
that the Company was then making, and in every way led me to believe that if I did not get in, why I would be simply losing the one opportunity of my life. He told me that I would be losing the opportunity of my life. I told him at that time that I did not have the money, but in view of the representations that he made as to the way it was coming along I would see whether I could raise it, and I made arrangements whereby I could get the necessary money. It was $10,000. Then when I told him that I could arrange to get the money he said to me, "Now, it won't be fair to the other people who have put up their cash at the dif- 591
ferent installment periods for you to come in at the last period and simply pay the $10,000, you ought to pay interest to equalize your payment with that of all of the others," and he said, "if you can get your money earlier than the date of the final installment I would like to have you do it, because money is close, and I have to carry along quite a number of the boys who have subscribed." So I told him that I would do the best I could for him, and on the 17th day of December I gave him a check for something over ten thou-

sand—$10,136.08—which represented the equivalent of $10,000 subscription to the Syndicate on the basis of paying 6 per cent. interest from the date on which each installment was payable up to the 17th day of December. When he made these statements to me I believed them. I did rely on them. I would not have made this payment to him if I had not believed and relied on what he said. I had to borrow the money to make it. I had no knowledge or information to the contrary of the statements that he had made at that
593 time. He never said anything to me as to what this property, that the Blast Furnace Syndicate intended to acquire, consisted of, excepting in a very general way. I could not say that he did specify the properties. He might have said that it was the United States Iron Company that was going in, but that did not mean anything to me. I think I had heard of the United States Iron Company at that time as a company. I had no knowledge that he controlled it or was even interested in it at that time. That information came subsequently. I did not have any knowledge or information at that time or subsequently,
594 until shortly before the commencement of this action, that he intended to turn over stock which he owned in the United States Iron Company in payment of his subscription. I did not acquire any knowledge or information that led me to suspect the truth of these statements which he had made to me until a long time afterwards, after the affairs of the company got into bad condition, and I heard that suits had been brought against Mr. Edenborn on the ground of misrepresentation. I believe you call it the Hecksher case. It was not until after I heard of that case that I had any

suspicion. I think I first heard of that case during the time that it was on trial. I cannot exactly place it by month or year, and whatever knowledge or information I acquired with reference to the truth or falsity of these statements was acquired when I first heard of it, and the information possibly had been augmented subsequently to that time. Up to the present time it has been augmented in the respect that possibly I could say that it has become more clear as to what the actual things were. I did not subsequently acquire any information with respect to August 596
Mann and his subscription until after that time. Not until after the trial, as to how he had paid his subscription. I would like to say in connection with the previous question that I received some letters written by Mr. Edenborn. After I had paid my subscription I received the stock. I told Mr. Edenborn I wanted it put in my wife's name, Caroline E. Alder, but he did not have it issued in that way, and when I received a certificate in my own name I turned it back and called his attention to the fact that I wanted it issued in my wife's name, and it was so issued. The money that I put into it was my own property. I continued to hold 597
that stock ever since and have it right now in my pocket. It was the fact that I was induced and led to raise this money and to pay it to Mr. Edenborn through the statements and representations that he made to me and my reliance on the truth of those representations. I absolutely believed them to be true, and only made it on that assumption and belief.

It is conceded that the witness, being shown the circulars marked in evidence al-

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ready in the testimony of Mr. Sim, identifies them as having been received from time to time subsequent to their dates.

The check now handed me is the check which I gave to Mr. Edenborn.

MR. STRONG: I offer it in evidence, the body of the check and the endorsements.

The paper was admitted in evidence and marked Plaintiffs' Exhibit No. 34, March
599 21st, 1911, C. B.

I do not think I wrote a letter to accompany that check. On December 11th. I wrote a letter to Mr. Edenborn with respect to this subscription, confirming what the understanding was with him (indicating paper). That is a carbon copy of the original letter.

MR. STRONG: I will offer that in evidence.

The paper was admitted in evidence and marked Plaintiffs' Exhibit No. 35, March
600 21st, 1911, C. B.

I received two letters from Mr. Edenborn acknowledging the receipt of my check. This is one. And this is the other (indicating papers) or rather they are copies of them.

MR. STRONG: I offer them in evidence.

The papers were admitted in evidence and marked Plaintiffs' Exhibits Nos. 36 and 37 respectively, March 21st, 1911, C. B.

I received from Mr. Edenborn the letter now shown you.

Mr. Strong: I offer that in evidence.

The paper was admitted in evidence and marked Plaintiffs' Exhibit No. 38, March 21st, 1911, C. B.

Mr. Strong: In connection with that I offer in evidence the stub check book of Mr. Edenborn, consisting of stubs of checks, showing the deposit of the same to his account in the Chase National Bank, to his individual account in the Chase National Bank.

The stub check book was admitted in evidence and marked Plaintiffs' Exhibit No. 39, March 21st, 1911, C. B. 602

Mr. Littleton: I concede that on March 28th, 1907, Mr. Alder addressed a letter to Mr. August Mann, William Edenborn and J. C. Walker, in which he offered to return to them a certificate of ownership of one hundred shares of the capital stock of the Sheffield Coal & Iron Company, and demanded that they return to him the sum of $10,136.08, paid by him for the stock, on the ground that the receipt of said stock and the payment of said sum was procured by fraud and deceit. 603

Looking at Plaintiff's Exhibit 38, now shown me, I had never heard of any courtesy of I. L. Ellwood before the receipt of that letter. I never heard of any arrangement by which Mr. Ellwood turned over to me any part of his subscription, before the receipt of that letter. I never knew before the receipt of that letter that Mr. Ellwood had anything to do with my subscription. I never heard or knew that August Mann had anything to

do with my subscription, or that there was any connection on his part with my subscription. I did not know until at or about the time of the commencement of this action how August Mann had paid his subscription to the syndicate. I did not know until at or about the time of the commencement of this action as to how Ellwood paid his subscription or as to how the Williams estate paid theirs. I never signed the syndicate agreement, either on my own behalf or on behalf of my wife. I never signed it at all.

CROSS-EXAMINATION by Mr. Littleton:

I say I relied on what Mr. Edenborn told me, and I believed in the truth of his statements. The particular statement that I relied on that I now say was not true is that the various people were paying in cash and making similar payments all on the same thing, that the business was earning money, that the investment was one that I could put away and forget because the earnings would be so large that I would miss the opportunity of a life time if I did not come in, and that it would be the last opportunity I would have if I did not take up the balance of Dr. Leslie Ward's subscription, which Mr. Edenborn told me Dr. Ward had written him he would be unable to take himself. He said that the Sheffield business was earning money. It was not organized then, that is the general way that it was spoken of, the Sheffield business. That is as definite as I can be about it. He told me that it would be a good investment, or in substance that, and that it would be a stock that I could put away and it would earn a large income. I knew that that depended entirely on the management of the concern. Whether he was

managing it—I knew that that was a statement of a then existing fact, because he told me that it was then earning money. As to whether it would earn a large income in the future and I could lay it away and forget it, I did not understand that that was the prospects of the Company. He told me that with the facilities of the Company there would be no question about it, because they would be fitted to make money. I was not a greenhorn in the steel business; possibly that is why I believed what he said, because the steel business had been very profitable. 608 I had been in the business for twenty-five years, and it had been profitable. I was perfectly familiar with the wire branch of the steel business. I had done other business during my young manhood; for a time I was in an insurance office, but mainly the steel business. Possibly I had heard of the United States Iron Company. I do not think I saw the Syndicate agreement. I do not think I knew that I was going to purchase the United States Iron Company's stock. I didn't inquire specifically what I was going to buy. As to whether I knew it was a corporation that I was taking over I 609 could not say. I do not think that it was presented to me. I did not ask specifically what the property was that I was taking over. I did not ask what it consisted of; only as it might be told me. I knew it was iron ore lands; it was ore lands, down South; I did not know specifically where. I did not inquire what the value of the stock of the corporation was. I did not have to inquire, I was told that originally they were to pay par for it, but they had—Mr. Edenborn had succeeded in getting it at a reduction from par, and—I do not know whether it was worth par at

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that time or not. I do not know what it was worth. I did not know what it was worth. I know now, by inference very little, as to what its value was at that time. I do not know anything about the value of the coal lands which the Company owned, ore lands. I have heard that the capital of the Iron Company was about a million, I do not know. I do not believe at the time I subscribed it owned a million dollars' worth of ore lands.

I understand very little what the then value of the ore lands were, which were owned by the
611 United States Iron Company. It depends altogether upon what you call value. I know what you mean by value, is what you can get for a thing. I do not now know what the then value of the ore lands owned by the United States Iron Company was. I do not now know what the then value of the stock of the United States Iron Company was. I made no inquiries at that time regarding the value of the land or the stock. I did not have to. I did not make any inquiries. I do not know to what stockholders' meeting Mr. Sim refers. I could not say without looking it up whether I was at the stock-
612 holders' meeting in 1906. I could not say definitely that I heard any complaint against Mr. Edenborn or his conduct until Hecksher brought his suit. I will say that owing to the reliance I had in Mr. Edenborn's integrity I was possibly as slow in coming to any conclusion that I had not been dealt fairly with as anyone could be. The particulars which indicate the fact to be that Mr. Edenborn's conduct towards me showed a lack of integrity are by telling me that he had a letter from Dr. Leslie Ward that Dr. Ward would be unable to take up the balance of his subscription,

inducing me to go out and raise money with which to put $10,000 into the Syndicate, and apparently there was no foundation to the statement about Dr. Leslie Ward, because it was not Dr. Ward's stock that I got. I say apparently there was no foundation for the statement. I did not make any investigation to find out about it. I have come to the conclusion apparently that he certainly did have a want of integrity on that point without investigating it. I do not think it needs investigation. I did not investigate it. Another point in which I find want of integrity is the general 614
statements that he made that each one was placing their cash in at the different times that the subscriptions were called, from the fact that it has developed that while I paid my subscription for the entire thing on the 17th day of December, and the installment was really due on the 20th, that Mr. Edenborn did not pay his as early as that. Also from the fact that Mr. Edenborn has testified that he personally loaned me the money to go into this scheme. I do not know that I recall just now any other point where I say his integrity was wanting in this transaction. I would say that was sufficient. I testified I had 615
the utmost confidence in Mr. Edenborn and in his integrity and ability. I think I also testified that I was not aware at the time of my subscription that there was going to be a purchase of the United States Iron Company by this syndicate. I did not see the syndicate agreement; and I did not make any inquiry about it. I relied absolutely on Mr. Edenborn's statements to me. I did not sign this syndicate agreement. I authorized no one else to sign it for me. I entered into an agreement with Mr. Edenborn which was con-

firmed in the letter which is before——, this yellow letter here.

I signed this letter of date December 11th, 1902. This letter embodies the entire sum and substance of my subscription to this stock, so far as any documents are concerned. I had had any number of conversations about it. I think those I have testified to already. At that time I treated the matter as being a direct purchase of stock from Mr. Edenborn. I had as much confidence in Mr. Edenborn at that time, as fully expressed in
617 my testimony here. I did have that confidence. If Mr. Edenborn had told me that the Sheffield stock which I bought was the stock of a company into which he had put the United States Iron Company, and that it was his intention to combine that United States Iron Company property with other properties which would be acquired, that it was his intention to erect two blast furnaces, and that he was a large owner, to the extent that he was an owner, of the United States Iron Company, along with Ellwood and others, and that in his opinion the stock of the Company thus formed out of the combination of these prop-
618 erties would be a success, and that the stock was a stock which was worth $100 per share I would have had confidence in Mr. Edenborn so that I would have accepted his statement. I cannot say whether I would have bought the stock just the same, because as I have testified I told him repeatedly, on his importunities to subscribe, that I did not have the funds, and that right here at the end when I did go in I had to go out and borrow the money. The sum and substance of it is that my confidence in Mr. Edenborn was practically unlimited as far as his ability to handle these properties was concerned. I knew he had been a

successful man in the wire business. If he had recommended this to me as an investment, there is not much doubt that I would have accepted it as a good investment. As a statement of fact, I would not necessarily have taken it. There would have been more reason why I would not have taken it under those circumstances than I did under these, because he told me that the concern was making money, that it was a success, prior to the time of my agreeing to go in. I do not know that it was. The facts seem to be conclusive that it was not. The receivership—a prosperous concern does not go into the hands of a Receiver. I think the receivership was the consequence of inherent defects in this plan. A receivership can overtake the Company at any state of its progress where it is losing money. I did not buy up any of these other claims. None of them has been assigned to me that I know of.

JOHN S. LEVIS, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Strong:

I am the general office man, bookkeeper, cashier and jack of all trades of the Sheffield Coal & Iron Company. I have produced certain books here this morning in response to a subpoena. I am not at all familiar with these books, but they are marked the books of the United States Iron Company. I produce seven books.

The following books of the United States Iron Company, to wit, Ledger No. 1, Led-

621 ger No. 2, Cash Book and Journal, were marked Plaintiff's Exhibits Nos. 40 to 43 for Identification, the Transfer Book of the Sheffield Coal & Iron Company, Exhibit No. 44 for Identification, Stock Certificate Book, United States Iron Company, Exhibit No. 45 for Identification and Minute Book Sheffield Coal & Iron Company, Exhibit No. 46 for Identification.

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623 ELMER E. STONE, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Strong:

I reside at Cleveland, Ohio, or in a suburb of Cleveland, Lakewood, to be exact. I am connected with the American Steel & Wire Company there as purchasing agent. I have been with that Company ever since the present Company was formed, and with other companies prior to that time that
624 were merged into it for about twenty-one years. I have known the defendant, William Edenborn, about that full length of time. I met him of course soon after I entered the employ of the first company. During the entire time until he left the Wire Company, here a few years ago, I was connected with companies with which he was also connected and a superior officer.

He was—I cannot say positively whether he was President or Vice-President of the Braddock Wire Company, the first company that I was connected with in which he was interested, but he was one of the principal owners. I was a clerk

in the mill office. During my entire connection with the companies with which he was also connected he always occupied a position at the top and I was away down the line. 625

In the American Steel & Wire Company of New Jersey Mr. Edenborn was, I believe, a Vice-President, but he was also one of the Executive Committee, which consisted of three people, I believe. I was made the general purchasing agent of that Company when it was formed. He was also one of the principal owners. A director and supposed to be one of the largest owners of the stock. 626 He had the reputation of being remarkably successful in business. He was reputed to be wealthy and worth a very large amount of money, and a very successful business man. His business standing and reputation was very high. His reputation, so far as I knew it, with respect to his general integrity, was very high. Owing to this knowledge which I had of his reputation in the direction to which you have referred, it led me to have confidence and trust in him, to the extent that I had the highest confidence in Mr. Edenborn's ability and in his integrity and straight-forwardness. 627 I would have accepted without question what he said or any recommendations that he would make of a business investment. At one time I had an office in the same building in which he had an office. That was on the ninth floor, I believe, in the Rookery Building, Chicago. This was during the period from February, 1899, I think the year was,up until the spring of 1905.

He had an office there during a part of that time, the fore part of the time. His office was in the large room in which the Executive Committee

628 had offices, on the same floor as mine. I cannot recall whether the office which he occupied had any sign on the door; possibly it had "Office of the American Steel & Wire Company" on that door.

Q. Did you ever know of his connection with the United States Iron Company? A. There was an office on one of the lower floors, that is below the ninth floor, as I recall it, on which I think there was a sign on the door, U. S. Iron Company.

I cannot say that I knew what his connection
629 was with the United States Iron Company. I did not know what interest he had in it, no. I used to see him quite frequently. I never at that time had any conversation on that subject with him. I never had anything to do with that Company at all.

I never had any connection or anything to do in any way whatever with the United States Iron Company, but after Mr. Edenborn moved his office from Chicago to New York he requested me to sell some furniture that was in this United States Iron Company's office, which I did; I sold at his
630 request some furniture that was in that office to the Illinois Steel Company, and wrote Mr. Edenborn in New York that I had done so, and he acknowledged receipt of that letter along about that time. To the best of my knowledge that was the only time that I was ever in the office. That paper shown me would be, as nearly as I can remember it, a copy of the acknowledgment.

MR. STRONG: I will ask to have this marked in evidence.

The paper was admitted in evidence and marked Plaintiff's Exhibit No. 47, July 11th, 1911, C. B.

Elmer E. Stone.

631

On May 31st, 1902, I wrote to him the letter which you show me.

MR. STRONG: I offer that in evidence. The paper was admitted in evidence and marked Plaintiff's Exhibit No. 48, July 11th, 1911, C. B.

I received the telegram now shown me.

MR. STRONG: I offer that telegram in evidence.

The paper was admitted in evidence and marked Plaintiff's Exhibit No. 49, July 11th, 1911, C. B. 632

I received the letter shown me from Mr. Edenborn. The slip entitled "Subscribers to Furnace Syndicate" was attached to the letter.

MR. STRONG: I offer those in evidence. The letter and the slip were admitted in evidence and marked Plaintiff's Exhibits Nos. 50 and 51, respectively, July 11th, 1911, C. B.

633

I wrote Mr. Edenborn the letter shown me dated June 7th, 1902.

MR. STRONG: I offer it in evidence. The paper was admitted in evidence and marked Plaintiff's Exhibit No. 52, July 11th, 1911, C. B.

I wrote the letter of July 26th, 1902, shown me.

634 MR. STRONG: I offer it in evidence. The paper was admitted in evidence and marked Plaintiff's Exhibit No. 53, July 11th, 1911, C. B.

I believe the Mr. T. B. Coles that is referred to in Mr. Edenborn's letter of June 2nd, Plaintiff's Exhibit 50, was one of the subscribers to the syndicate agreement and he is one of the persons who has assigned their claims to Mr. Sim. I saw Mr. Edenborn in Chicago between the date of this
635 last letter and August 6th, 1902, that is between July 26th, 1902, and August 6th, 1902. He said that he had received my letter and that I could have that amount of stock, but that the first call of twenty-five per cent. had been made and that he had paid it, and that I would have to pay that call and interest from the date when he had made the payment. I told him that I would do that. I wrote him that letter, copy of which you show me dated Aug. 6th, 1902.

MR. STRONG: I offer it in evidence. The paper was admitted in evidence and marked
636 Plaintiff's Exhibit No. 54, July 11th, 1911, C. B.

Subsequently I wrote him about increasing my subscription to $10,000. I wrote Mr. Edenborn such a letter as that dated December 10th, 1902, shown me.

MR. STRONG: I offer that in evidence. The paper was admitted in evidence and marked Plaintiff's Exhibit No. 55, July 11th, 1911, C. B.

Elmer E. Stone. 637

I did not get that additional stock. I paid the calls on my subscription as they became due. When I made my final payment of my subscription for $5,000. I soon afterwards received the certificate for 50 shares of the stock. And I have held it ever since. I made an assignment of my claim in this case against Mr. Edenborn, for damages, to Mr. Sim. I signed that paper shown me.

MR. STRONG: I offer that in evidence. The paper was admited in evidence and marked Plaintiff's Exhibit No. 56, July 11th, 1911, C. B. 638

I also sent a notice to him prior to signing this assignment tendering back my stock and demanding payment of the amount that I had paid for it. On December 17th, 1903, I received that letter from Mr. Edenborn.

MR. STRONG: I offer it in evidence. The paper was admitted in evidence and marked Plaintiff's Exhibit No. 57, July 11th, 1911, C. B. 639

I replied to the letter. I wrote him such a letter as that shown me.

MR. STRONG: I offer it in evidence. The paper was admitted in evidence and marked Plaintiff's Exhibit No. 58, July 11th, 1911, C. B.

I had a copy of the printed circular letter, Plaintiff's Exhibit 8, and that is the letter to which I referred in Exhibit 58 as "Your letter of

640 Elmer E. Stone.

September 25th." I received the letter now shown me, dated January 2nd, 1904, and signed Mr. Edenborn, President.

MR. STRONG: I offer it in evidence. The paper was admitted in evidence and marked Plaintiff's Exhibit No. 59, July 11th, 1911, C. B.

I subsequently wrote to him the letter dated January 13th, 1905, shown me.

641 MR. STRONG: I offer that in evidence. The paper was admitted in evidence and marked Plaintiff's Exhibit No. 60, July 11th, 1911, C. B.

I received that letter shown me from Mr. Edenborn.

MR. STRONG: I offer that in evidence. The paper was admitted in evidence and marked Plaintiff's Exhibit No. 61, July 11th, 1911, C. B.

642 I wrote that letter shown me, dated January 28th, 1905, to Mr. Edenborn.

MR. STRONG: I offer that letter in evidence. The paper was admitted in evidence and marked Plaintiff's Exhibit No. 62, July 11th, 1911, C. B.

I made my subscription on the strength of the statements in his letter to me of June 2nd, 1902. I made it absolutely on the recommendation or on the strength of that letter. I believed the statements contained in that letter. I believed the

statements contained on the enclosed list of subscriptions. I believed that those subscriptions had been made, as stated on that enclosed list. I relied on those statements, the statements of that letter and in that subscription list in making my subscription to the extent that I accepted those statements as true without question, and I relied upon them in making my subscription. I had no knowledge or information to the contrary of the facts stated in the letter and list of subscriptions. If I had had such knowledge that those statements were untrue I would not have 644
made the subscription. Taking the first subscription, Mr. Edenborn, Executive Committee, United States Steel Corporation, New York City, $500,000, I had no knowledge or information at the time that I made my subscription that Mr. Edenborn intended to pay that subscription otherwise than in cash. Referring to the subscription of I. L. Elwood, capitalist, De Kalb, Illinois, $300,000, I had no knowledge or information at the time that I made my subscription that Mr. Elwood intended to pay otherwise than in cash. Referring to the subscription of August Mann, Superintendent, A. S. & W. Co., Braddock, Pennsylvania, 645
$100,000, I had no knowledge or information at the time that I made my subscription that Mr. Man intended to pay or would pay otherwise than in cash. I had no knowledge or information at the time that I made my subscription that the Mississippi Valley Trust Company, on behalf of the Williams estate, intended to pay or would pay otherwise than in cash. I do not remember whether I ever signed the Blast Furnace Syndicate subscription or not, but I think not. I recall writing Mr. Edenborn in reply to one of his

letters, authorizing him to sign for me whatever papers were necessary to put me into the Syndicate. It would have made a difference if I had learned after the receipt of this letter that Mr. Edenborn was not going to pay his subscription in cash the same as the rest, then I would not have gone in. If I had heard at the time that I made my subscription of $5,000 that Mr. Edenborn did not intend to pay his subscription in cash that would have made a difference to me. I would not have made my subscription under those con-
647 ditions. If I had known that he was going to turn over United States Iron Company stock instead of cash that would have made a difference. I would not have made my subscription. I first had knowledge or information as to his having turned over stock of the United States Iron Company instead of paying in cash, and of Elwood having turned over United States Iron Company stock instead of paying in cash, and of the Mississippi Valley Trust Company, on behalf of the Williams estate, having done the same thing, and of August Mann having turned in real estate instead of paying his subscription in cash, I think it
648 must have been along late in 1906. I heard of it through Mr. Coles. In talking with Mr. Coles he told me of certain information that had been obtained during the trial of the Heckscher case. I first heard of it during or after the trial of the Heckscher case, in the fall of 1906. I never took any part in the affairs of the Sheffield Coal & Iron Company.

After I become a subscriber to the syndicate agreement and paid in the $5,000., and after the Company had been running along for some time, I received various circulars from Mr. Edenborn

as President, and communications from him, printed and typewritten. 649

MR. LITTLETON: I will concede he received the same circulars that were sent to Mr. Sim.

CROSS-EXAMINATION by Mr. Littleton:

I said I had been connected for some twenty odd years with The American Steel & Wire Company and the companies that have been merged,—that preceded it during that period or nearly all 650
that time, I had known Mr. Edenborn. As to whether I have kept up with the steel and wire business, pretty well, I have been employed by the companies all the time during that time. It has been my work, my life work, practically, for that period of time, about twenty-one years, since I first entered it. I didn't say I went to Chicago, in 1905. I left Chicago along about that time; I went to Chicago in about I think it was 1899, it was the year that this present American Steel & Wire Company was formed, I think, in February, 1899. The offices were in the Rookery Building, and Mr. Edenborn's office was also in the Rookery 651
Building. My office was on the same floor with his while he had an office there in the Rookery Building. He was, as I remember it, a Vice-President of the Company, and he was one of the Executive Committee. The office of the United States Iron Company, or the place where its name was upon the door, was on one of the floor below where Mr. Edenborn's office was, as I remember it. As I recall it, that name was the United States Iron Company, printed upon the door like an ordinary sign. I do not remember what else

was on the door. I do not remember whether Mr. Edenborn's name was on the door or not. After he left Chicago I received some instructions from him regarding the selling of some furniture in the office of the United States Iron Company. I do not recall now the date when that was; his letter acknowledging my advice to him of the sale is here. I would say it was before my subscription to this syndicate agreement. I cannot just place the dates, but I would think so. When I received the instructions from him or received the instruc-
653 tions from him to sell the furniture, I either knew or found out where the office of the United States Iron Company was; it is ten or twelve years ago and I cannot tell. I knew that he was in some way connected with the United States Iron Company if he gave me instructions to sell the furniture. I knew nothing at all about the extent of his interest in it or connection with it. Mr. Edenborn's acknowledgment of the letter will show how long that was before the subscription was made to the syndicate agreement. I cannot recall that. Exhibit 54 dated December 16th, 1901, would indicate that that was the time. I did not
654 to my knowledge see a copy of the syndicate agreement. I do not believe that I ever saw that. As I recall it I wrote Mr. Edenborn a letter authorizing him to sign for me any papers that were necessary to get me into the syndicate. The only knowledge that I had of what the syndicate was organized to do was that contained in Mr. Edenborn's letter to me dated June 2nd, 1902. I did not know about the syndicate until I got that letter; I never had heard of it.

There was no mention in this letter or in any other addressed to me of the proposition to pur-

chase the United States Iron Company. There was never any conversation in which it was suggested that they proposed to purchase the United States Iron Company. I did not make any inquiry concerning the property which they were about to purchase. I never had heard of this proposition until I received this letter from Mr. Edenborn. There was a list of the subscribers attached to that letter of June 2nd. That is the list which is attached to this letter. The statement in this letter was absolutely the description I had of the enterprise. I went in solely on the strength 656
of that letter. When I said Mr. Edenborn "had the reputation of being remarkably successful in business," that was true. I recall my testimony that "he was reputed to be wealthy and worth a very large amount of money. And a very successful business man," and that owing to this knowledge which I had of his reputation in the direction to which I have referred, it led me to have any confidence and trust in him, to the extent that I had the highest confidence in Mr. Edenborn's ability and in his integrity and straight-forwardness. I would have accepted without question
what he said or any recommendations that he 657
would make of a business investment. I recall the question, as to whether I would have made my subscription or not. If I had known that Mr. Edenborn's subscription of $500,000 was not a cash subscription and was not to be paid the same as the other subscriptions in cash, and the subsequent questions and answers. When I said, "Well, that is under the—" what I meant there was this: if I had known that Mr. Edenborn was paying his subscription by turning in stock or something other than cash, after having his letter that there were

no special advantages to him, I would not have gone into the syndicate. That is what I mean. I meant that then. I did not possibly just get the question as it was intended. I do not know how much a person is permitted or how much he ought to say here, that is, what is permissible. If Mr. Edenborn had come to me with some proposition of some consolidation of companies, not particularly this, but other companies, and said it was a good thing, I would have had such confidence in him that I would have gone in, just as
659 when the first American Steel & Wire Company was formed I went into that underwriting, not on Mr. Edenborn's—

When counsel interrupted me and suggested to me, "Never mind 'if' or something that did not happen," where I had said, "if Mr. Edenborn had said to me that he was going to form a combination——" I had in mind to say at that time simply just what I have said. That is my answer. I did not say that I did not know anything about the United States Iron Company at the time. I knew nothing whatever about the United States Iron Company only that I did know that there was such
660 a company, for I sold office furniture for it. That is all I knew about the Company. I did not know a thing about what it owned. I did not know its capitalization; and the only person that I knew or suspected had any interest in it was Mr. Edenborn, because he instructed me to sell the furniture. That is all I know about it, that Mr. Edenborn instructed me to sell the furniture, and I did it. I understood from Mr. Edenborn's letter that ore properties that were to be selected by Mr. Dickman and Mr. Walker were to be bought. I find as a matter of fact that Mr. Dickman and Mr. Walker had nothing whatever to do with the

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selection of the property that was bought. I believe it is said in this letter that it was to be selected by them. The letter will show. I have not read the letter for quite a while. My confidence in Mr. Edenborn was of such a character that I would have accepted any recommendation that he would have made as to a business investment without question at that time. If Mr. Edenborn had said to me that he was going to take the United States Iron Company, in which he was a large owner, and by the addition of new capital or new money form a new company and turn in the stock of the Iron Company at what it cost the men that owned it, that he believed it to be a good thing, and that he recommended it to me as an investment, if the proposition had been put up to me, as you say there, I had such confidence in Mr. Edenborn that I would have gone in without question; but it was not put up to me that way.

662

I heard of the case of Hechscher against Edenborn. Up to that time I had attempted to undo the trade that had been made, my subscription. I had offered to sell the stock back to Mr. Edenborn at what it cost me. I had made a written statement to him regarding my being deceived or it being misrepresented to me. I wrote Mr. Edenborn, I would say, possibly a year prior to that time on that line.

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On December 26th, 1903, I wrote to Mr. Edenborn in reply to some letter he had written me in regard to bonds, that I was unable to take the bonds, and I notice I offered the stock back to him at par without interest. Just in glancing over it I do not see anything in that letter about anything being misrepresented to me of that kind.

664 That was my offer, practically my declination to take any bonds and my offer to sell the stock. I do not recall whether that is the first letter that I wrote offering to sell the stock or not, I am inclined to think there was one prior to that even. The letter I received in reply to the one I wrote in December, 1903, was the one that Mr. Edenborn wrote of date January 2nd, 1904. Up to that point in our correspondence there was no statement by me or suggestion, that I can recall, that any misrepresentation had been made to me; I do
665 not see any copies here of any.

I did not make any suggestion in my letter to Mr. Edenborn of January 13th, 1905, that any matter of fact had been misrepresented to me in the sale of the stock to me. There is nothing questioning his integrity in it.

The next letter of which I have a copy here is January 28th, 1905. I cannot recall any letters which I sent that I have not got. I do not believe that I have before the Referee all the letters that I wrote to Mr. Edenborn, and his replies thereto. I mean that there are letters which I wrote him
666 of which I have not copies. One that has been referred to and which I told you that as I recollect it, I wrote Mr. Edenborn authorizing him to sign the syndicate agreement. That is the only one that I can recall. Leaving that letter out of account, so far as I can recall, I have the complete correspondence here between Mr. Edenborn and me.

In the letter of January 28th, 1905, I say that he has failed to answer my letter of the 13th, and "as you know, when I went into this Company it was after the allotments had all been made that

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you sold this stock to me personally, and then you did it wholly on the strength of the statements contained in your letter of June 2nd, 1902." That was correct. That was true. I further stated: "In your letter you stated that Messrs. Keefe, Merriman, Baackes and Watson had subscribed various sums. One of the parties mentioned has told me that he never subscribed for a dollar's worth of the stock." That party was J. S. Keefe. I wrote that letter, so I acknowledge the whole letter.

668

I did not state in that letter, the only grievance or cause for complaint that I had. I didn't because I did not know it. The other cause of complaint I subsequently learned was that there were others besides Mr. Edenborn that turned in stock, one of them turned in land in payment of the subscription. I learned later, in regard to the price at which the stock was turned in, that it was not turned in at the cost even to the original owners. I learned that from the evidence in the Heckscher case. As to whether the question of cost was gone into in the Heckscher case, I saw a statement showing how the cost was figured, that was the result of the Heckscher case, possibly that will make it.

669

I do not know who made the statement. I saw it in my attorney's office. I do not know who prepared the statement. Up to the time I saw that statement the question of the calculation of the cost and the method at which that cost was arrived at had not been suggested to me. I received a letter in reply to this one, of January 28th, 1905, from Mr. Edenborn, of February 1st, 1905, which has been marked in evidence. Mr. Edenborn says in this letter:

670 "You are wrong when you ignore the fact that you were a syndicate subscriber; that you put your signature to a document setting forth most emphatically that it was proposed to purchase the United States Iron Co. properties though to oblige yourself and others I did cut down various subscriptions notably that of Mr. W. R. Walker, who wanted $10,000 worth more than he got; cut down L. L. Ellwood $50,000 and myself $25,000, viz from $500,000 to $475,000 though finding one of the subscribers unable to meet payments I purchased $10,000 at par, thus giving me $485,000
671 in the enterprise, and I have paid Dollar for Dollar, with everyone else."

That rather answered me the question that I was bringing up in this letter of January 28th. After they commenced asking us to subscribe for bonds and talked of a Receivership, then I got to talking with different ones that were mentioned in that letter to me of Mr. Edenborn of June 2nd. One of them told me that he had not subscribed. Well, then, from someone, I cannot say now from whom, because I talked with several of them, I heard something about this United States Iron
672 Company going in. That is the first I had heard of it. Along that time, that was the first that I had heard of it. Then I wrote to Mr. Edenborn, and he came back and said that he paid dollar for dollar, and he did not say in the letter that the United States Iron Company was going in, as I recall it. I mean this letter here. I have not read the letter for a long time, but as I recall it, it don't say that the United States Iron Company is the property that they are buying. Mr. Edenborn said at the bottom of his letter:

"The fifty shares you have were in pursuance of your signature to the blast furnace

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agreement, which was formed to purchase the United States Iron Co. properties, as distinctly stated, and you seem to have overlooked the fact that during your visit to this office last fall, you stated then, within full hearing of my office force that you knew that I had been a stockholder in the United States Iron Co., that the office was with the offices of the American Steel & Wire Co., in the Rookery, Chicago; that the name was on the glass door, and that it was common knowledge that Messrs. Gates, Ellwood and myself were the principals in that company."

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I did not make such a statement that I can remember. I deny making a statement that it was common knowledge that Ellwood and Gates were in it. I may have said to Mr. Edenborn—I could not say that I knew he was a stockholder, and Mr. Edenborn never told me that he was a stockholder, but he asked me to sell some furniture for that Company, and I knew that he was connected in some way with it, and I may have referred to that in some way in Mr. Edenborn's office.

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I am not making any point of the fact that I did not sign the syndicate agreement, only I say the question was asked me there, and I say to the best of my knowledge I do not remember ever signing it. I know that I did not sign it until after I had paid in anyhow part of the money. My recollection is that I never saw it, as I remember it. I made an assignment of whatever claim I had to the plaintiff in this action. I have met Mr. Sim. I met him about the time of the assignment. I have not yet received any money for the assignment. I do not know that it depends upon the result of this law suit. As to

676 whether or not the amount of money that I get out of this claim depends upon how this case is decided, it would depend on——well I have assigned that to Mr. Sim to handle it as he sees fit; I have given him I suppose what you call a legal title to it—is that it? I did not part with all my interest in it. As to whether I own any part of it now I have assigned that to Mr. Sim to make what settlement or take such action as he desires. And if he gets the money or part of it he will pay me pro rata I imagine. I do not know how
677 you want that expressed. As to whether all these assignors pooled their claims. I do not know what the others did. I understand that there are a number of causes of action which have been assigned to the one plaintiff who is seeking to enforce all these causes of action. If I recover the full amount of my claim. I will get what is recovered. Mr. Sim would have something for his—I would have to pay Mr. Sim or he would have to take it out of that for his. We have no definite arrangement on that subject. that was to be—that will have to be settled after we know what we get. He has not yet paid me anything for the
678 claim at all. He has not agreed to pay me anything; he has not agreed on any amount. We do not know the value of it—the value has to be ascertained before we can—— No fractional part of it has been agreed upon with me to go to him. I am contributing to the expenses of this action.

RE-DIRECT EXAMINATION by Mr. Strong.

Looking at Plaintiff's Exhibit 16. being the Blast Furnace Syndicate Agreement. with the names of the subscribers to it which you hand me

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I find my name there. but it is not my signature. I did not write it. What I had in mind in answering one of Mr. Littleton's questions as follows:

> "Why, if the proposition had been put up to me, as you say there, I had such confidence in Mr. Edenborn that I would have gone in without question; but it was not put up to me in that way. What I mean, Mr. Littleton—"

is that this was at a time when there were a number of combinations—I suppose that word is correct—being formed, and we all heard of the big profits that were made by the people that went into them. Unfortunately I did not go into the present American Steel & Wire Company underwriting and regretted it; and had Mr. Edenborn said to me that there was another combination being formed that was a good thing, that he considered a good thing, a safe investment, I would have gone in. But after receipt of Mr. Edenborn's letter saying that there were no special privileges to anyone, or advantages—privileges or advantages, which ever word he uses—on this property, and the tone of the letter, which would not convey to me the idea that the United States Iron Company was going in, but exactly the reverse, by mentioning that it was to be a property selected by Dickman & Walker, then if I had learned through any source or gotten any knowledge that Mr. Edenborn was not paying in the same that I was, I would not have gone in.

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Re-Cross-Examination by Mr. Littleton.

I heard something to the effect that the property of the United States Iron Company was the

property which had been acquired by this new company along about the time that I wrote Mr. Edenborn there on—January 28th, 1905, I think, is the date of that letter. I was getting the information. I was hearing reports that the United States Iron Company's property was the property which had been acquired long prior to that letter. That was the first I knew about it, along about that time. I did not, to my knowledge, then inquire as to the value of the property, or the value of its
683 stock. If Mr. Edenborn had told me that the United States Iron Company was an Iron Company in which he owned this amount of stock, in which Ellwood owned some and in which others owned some other amounts, that he proposed to get new money, put it all together, and build two blast furnaces, that in his opinion it would be a very profitable investment, and that he owned the stock to the extent which he did own it, I think I would have gone in if he had put up the proposition in that way. But if I had learned this after receipt of his letter I would not have
684 gone into it. I certainly do think the failure of his letter to disclose that he was the owner of the stock, and my subsequent learning it before I subscribed, would have caused me not to subscribe.

Marvin Scudder, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. Strong:

I reside at 45 Fifth Avenue, New York City. I am an accountant and a reporter on securities.

Marvin Scudder. 685

I am an expert on security valuations. My office is at 55 Wall Street. I have been engaged in this business ten years. My technical training was at college. I graduated from Yale in 1899, and while there I took a business course in the evenings. When I graduated from Yale I went to the School of Commerce, Accounts and Finance at the New York University, and took the evening course there for two years, graduating in the class of 1901 with the degree of Bachelor of Commercial Science. My practical training has been for a short time with a trust company, and then in the 685
business which I am in now, which has among its facilities a financial library which contains information on securities from all over the country, which I have been able to collect at considerable expense. I have made many examinations of books of account of iron and coal properties. I am familiar with their methods of transacting business, as to the way in which they keep their accounts, and as to the conduct of their financial affairs, so far as they are contained in the books of account. I have been employed largely as an expert accountant and expert valuer of securities. By securities I mean stocks of corporations. I 687
have employment in the way of security valuations for some of the state departments. I have had for a number of years a contract, which has been renewed each year, with the Comptroller of the State of New York, for valuing unlisted securities in transfer tax proceedings, and in that matter I value at least two hundred securities a month. My recollection is that there have been five Comptrollers that have employed me. I am also employed by the officials of other states. I have been employed for two years now by fifteen

insurance commissioners of the United States to value securities as of the 31st of December each year, securities held by insurance companies doing business in the United States and located in the United States; and before that for two years, as my recollection is, by two insurance commissioners, the Superintendent of Insurance of New York State and the Superintendent of Insurance of Massachusetts. I have had something to do with the examination of books of account to ascertain the condition of things in connection with public
689 proceedings.

I was employed by the so-called Armstrong Investigating Committtee; the Consolidated Gas; the Insurance, that is the Armstrong, under Governor Hughes—I did all of his work as accountant. I have been employed by the Public Service Commission, by the Commissioners of Accounts, and by the Attorney-General, and I could go on —I have been employed by the Government at Washington. I have had considerable experience in doing that sort of work to which I have referred. I have made an examination of the
690 books of the United States Iron Company.

Mr. Strong.—I produce the books of the United States Iron Company. Marked Exhibits 40 to 46 inclusive for identification. I offer these books in evidence to show the condition of the United States Iron Company at the time of the formation of this syndicate, and ask that they be marked as exhibits.

Mr. Littleton. — Objected to on the ground that they are immaterial. There is no claim of any misrepresentation made

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here, any testimony up to date, as to the value of the stock of the United States Iron Company, by any witness or by any plaintiff.

Mr. Strong.—It is an allegation of the complaint that this was a worthless concern and of no value. The purpose of the evidence is to show that the United States Iron Company, which is at the foundation of these actions, was at the time that it was put into this syndicate arrangement a practically worthless company, of little if any value, and that its stock was also of very little if any value, and that the representations of Mr. Edenborn with respect to the United States Iron Company were entirely untrue.

692

Mr. Littleton: I object also on the ground that the evidence is technically incompetent.

The Referee: That may be; I cannot tell now. I will overrule the objection.

Exception taken by the defendant.

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Mr. Strong: The first one is Exhibit No. 40 for identification, the United States Iron Company ledger.

Mr. Littleton: The objection is made to this, if the Court please, on the ground that it does not appear to have been made either by the direction or under the authority of the defendant in this action, and that it is a book of a corporation of which he was simply a director, and such books are never admissible, either against a director or a stockholder of a concern, as ad-

missions or as proof of any concession or admission which he might make. In other words, these are perfectly hearsay evidence upon this question; they establish nothing which is binding upon this defendant. It is not claimed that they were made by him; it is not claimed that he ever saw them; it does not appear who wrote them, and the rule is well established that the books of a corporation are not admissible either against directors or stockholders as
695 admissions against their interest.

THE REFEREE: Mr. Strong, if you prove that he was an officer of this corporation at the time at which you seek to investigate the status, I will take the testimony and give Mr. Littleton the exception.

MR. STRONG: I offer in evidence the minute book of the United States Iron Company. And in particular the minutes of the first meeting of directors on October 18th, 1899, showing that the defendant Edenborn was elected second Vice-Presi-
696 dent and a member of the Executive Committee.

THE REFEREE: Objection overruled.

Exception taken by defendant.

The book was admitted in evidence and marked Plaintiff's Exhibit No. 46, July 14th, 1911, C. B.

MR. STRONG: I now offer in evidence ledger No. 2.

MR. LITTLETON: Same objection.

THE REFEREE: Objection overruled.

Exception taken by defendant.

The book was admitted in evidence and marked Plaintiff's Exhibit No. 41, July 14th, 1911, C. B.

MR. STRONG: I offer in evidence the cash book.

MR. LITTLETON: Same objection.

THE REFEREE: Objection overruled.

Exception taken by defendant.

The book was admitted in evidence and marked Plaintiff's Exhibit No. 42, July 14th, 1911, C. B.

MR. STRONG: I offer in evidence the jour- 698
nal.

MR. LITTLETON: Same objection.

THE REFEREE: Objection overruled.

Exception taken by defendant.

The book was admitted in evidence and marked Plaintiff's Exhibit No. 43, July 14th, 1911, C. B.

MR. STRONG: I offer in evidence the stock transfer book.

MR. LITTLETON: Same objection.

THE REFEREE: Objection overruled.

Exception taken by defendant.

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The book was admitted in evidence and marked Plaintiff's Exhibit No. 44, July 14th, 1911, C. B.

MR. STRONG: I offer in evidence the stock certificate book.

MR. LITTLETON: Same objection.

THE REFEREE: Objection overruled.

Exception taken by defendant.

The book was admitted in evidence and marked Plaintiff's Exhibit No. 45, July 14th, 1911, C. B.

700 Marvin Scudder.

I have made an examination of the books of the United States Iron Company to ascertain what the assets were on or about August 31st, 1902, for the purpose of making a valuation of the stock of the Company at that time. I have examined the books that have been produced here today, marked Plaintiff's Exhibits Nos. 40 to 46, inclusive.

Q. What was the first item of assets that you found upon the books?

701 MR. LITTLETON: I take it that all this testimony, without my making any objection, is taken subject to my objection that it is incompetent, immaterial and not binding upon the defendant Edenborn.

THE REFEREE: Yes.

MR. LITTLETON: And an exception?

THE REFEREE: Yes.

The first item of assets as of August 31st, 1902, that I have on this sheet of paper that I have gotten up as taken from the books is $584,875.77, representing land, and so headed in the ledger.

702 From an examination of the ledger I am able to state what that figure for the land was based on. That item just mentioned contains $510,927.72 as taken from the second page of the ledger, and that is a part offset to $750,000 of capital stock. That is to say that there was a stock issue of $750,000, of which that item you have just read, five hundred and ten thousand and odd dollars, was a part. The journal shows that land was paid for by that portion of $750,000 of capital stock paid to E. F. Williams, eight per cent., John Lambert, ten per cent., C. G. Gates, ten per cent., I. L. Ellwood, twenty-four per cent., J. W. Gates,

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twenty-four per cent., William Edenborn, twenty-four per cent.; total $750,000. That is the capital stock paid for the real estate, of which the land, $510,927.72, was a part; and paid to these gentlemen, as the minutes also show. That is to say that this land was paid for in stock and not in cash.

The first page of the journal has this entry: real estate, Dr., $750,000. To capital stock, $750,000. Stock was issued these parties for their respective shares in West Point Mining Company properties owned by the West Point Mining Company, namely, E. F. Williams, eight per cent., and so on, as I have stated before. The difference between the $510,927.72 and the $584,875.77 is made up in numerous items of property, of real estate and some supplies, of which the largest items are, West Point Mine, $25,000; equipment of same, $20,000; Smith Mine, $100,000, and equipment of same, $85,000.

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Only the item that I have mentioned, $510,927.72, was paid for by that first issue of stock. I did not say that any more than that was paid for. In making up my valuation of this stock I have taken the land at the book values as stated on the journal.

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The next item of property constituting the assets of this Company that I found was Florence real estate, $5,000. I have made up a statement of the assets and liabilities as of August 31st, 1902, with some corrections.

This statement which I have handed to you is the statement that I made up.

MR. STRONG: I offer that in evidence.

706 To the Referee:

It is taken from the books in most respects. I have made some corrections.

To Mr. Littleton:

I have made this tabulation from the books of the United States Iron Company with which I have been furnished. This tabulation shows a balance sheet of assets and liabilities at August 31st, 1902, as taken from the books. There is nothing appears on this sheet except that which
707 is easily ascertainable from the books. There are deductions which I have made which appear on this sheet.

Mr. Littleton: I take the same objection to this tabulation of the books of the concern as I have heretofore taken to the books of the concern, and upon the additional ground that it appears that the witness has added to that the deductions which he as an expert made.

The Referee: You do not object, Mr. Littleton, on the ground that the items
708 constituting that should be admitted in evidence?

Mr. Littleton: I believe the rule is, as I understand it, that after the books are in evidence a tabulation by an expert is admissible in evidence. I do not take that ground. The only thing is that I think the deductions of the witness as they appear on the sheet are not proper.

The Referee: I will receive the sheet. Exception taken by Mr. Littleton.

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The paper was admitted in evidence and marked Plaintiff's Exhibit No. 63, July 14th, 1911, C. B.

To Mr. Strong:

The next item after the land is the Florence real estate, $5,000; Treasurer's cash account, $4,443.81; West Point cash account, $110.47, making $594,430.05. Then the next items are mining properties, the book figure of the West Point mine, $45,287.09, of Smith mine and properties, $236,537.22, making a total of the two, $281,824.31. There are also taken into account as a part of the assets sundry accounts receivable amounting to $26,950.99. As to what was deducted by me from the valuation appearing on the books for depreciation in arriving at a basis for my valuation of the stock of the United States Iron Company, in all coal mining and iron mining properties there are different kinds of depreciation. As the mineral is taken from the ground there is what we call a depletion, and it is customary to set aside a reserve, called a depletion reserve, for deduction each year from the original valuation of the property, so that at the time all the mineral is taken from the ground that part of the valuation that has to do with what was in the ground at the start is entirely wiped out. There is another form of depreciation which is necessary; that is the depreciation on machinery and equipment. In the mining business the machinery wears out very rapidly, and ten per cent. is a conservative amount to charge off against such machinery each year. There is, in addition to that, a certain maintenance charge, which is different from deprecia-

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tion on machinery; it is the keeping up of the machinery, but it does not have much to do with the depreciation, because the depreciation you cannot overcome by a maintenance charge. Those three kinds of depreciation are important, and very important, in coal and iron mining properties. Each property is different. In order to be exact, to get an exact amount of what the depreciation should be, it is necessary as a general thing to examine the property, have an engineer tell you how much there is in the ground, and so
713 forth and so on. I have had some little experience in setting up such reserves as I have spoken about on mining properties. During the last year or two I had that to do in connection with the Cambria Fuel Company in Cambria, Wyoming, and the Monon properties, which were the Walsh properties, out in Indiana; and I have had other cases of that kind, such as the Eastern Steel Company and the Taylor Iron & Steel Company, all within a recent period. I could mention others.

Q. Let me ask you a question right there. In all these cases, and in such operations generally,
714 what is the percentage that is fixed as representing the ordinary depreciation?

MR. LITTLETON: That is objected to, if the Court please, as clear speculation.

THE REFEREE: What do you refer to? Do you refer to the depreciation in the ground or the depreciation of the machinery?

MR. STRONG: Well, taking them all together, what is the amount that is generally fixed as, or the percentage generally fixed

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as representing the depreciation of such properties.

MR. LITTLETON: That is objected to upon the ground that it does not appear that the witness has made an examination or that anybody else has made an examination of the property, and the witness has said that it is necessary in order to have an exact idea of it to make such an examination; and upon the further ground that he has also said that properties differ in this particular very largely, and it becomes a geological question as to what the depreciation is, and it is entirely too speculative to have any probative force as evidence. He asks him generally what is generally allowed.

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THE REFEREE: I think I will allow it.

Exception taken by Mr. Littleton.

A. In regard to mining machinery the amount of depreciation that is almost generally in use is ten per cent.

TO THE REFEREE:

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That is over and above maintenance. In this particular case I have grouped them together, but I have taken less than ten per cent. on the machinery, that is, I have made it conservative.

TO MR. STRONG:

The usual amount in companies of this character generally which is allowed for depreciation would be ten per cent. on machinery. On the depletion it would depend on how much property there was in the ground and how much was taken

out each year. Now, in this case we have a period that we know about as to how much in dollars and cents was taken out, and we know what the book figure is on the value of those mining properties; therefore, we can make a pretty conservative statement and be sure that we are below what the figure would ordinarly be.

I find for the two years and ten months since this Company existed the depreciation reserve should be at least, on the $281,824.31 of mining property, $59,958.71; and I have been conserva-
719 tive in getting at that figure, for I have taken only seven and one-half per cent. for ten years, leaving twenty-five per cent. of the property at the end of ten years. Seven and a half per cent. a year would amount for two years and ten months to $59,958.71. That is at the rate of a little more than $16,000 a year. Leaving the value of the assets on the basis of their original valuation as appears on the books, with the deduction made, of $281,824.31, mining property assets. The whole assets, less the deduction for depreciation as I have got it, amount to $843,246.64. That is on the
720 basis of seven and a half per cent. for ten years. And for two years and ten months of the ten years, during which this Company was in existence, at seven and a half per cent. a year the amount of depreciation would be $59,958.71.

I examined the books with the end in view of ascertaining whether there was any deficiency which had accrued since the incorporation, and I found that in my opinion there should be $49,-089.94 added to the expenses. Before that, that deficiency that I speak of, of $38,792.85 is the difference between the earnings for the two years

and ten months and the expenses as I find them for the two years and ten months, and the item is $38,792.85. As I take them from the books, including, of course, this depreciation, there was a deficiency between the receipts and expenses of $38,792.85? There is no depreciation in the books.

To Mr. Littleton:

Including in the $38,000 depreciation and appreciation. 722

To Mr. Strong:

That is to say in estimating this deficiency of $38,792.85 I have included the amount of $59,958.71, which I have deducted from the value of the assets for depreciation; that is chargeable to profit and loss.

To the Referee:

On the books they did not write it off. They made no entries whatsoever in regard to any depreciation, maintenance or depletion. 723

To Mr. Strong:

I found that in January, 1902, they paid a dividend of $46,250, said to be five per cent. on the capital stock; the total deficiency then on August 31st, 1902, would be $85,042.85. I ascertained from the books whether there had been any statement made of the condition of the Company with respect to surplus.

Q. What did you find that they had stated the surplus to be, the books?

724 Marvin Scudder.

MR. LITTLETON: That is objected to on the ground that it is not the case of anybody buying upon any such representation as that; and the fact that they made such a statement is utterly immaterial in this action.

Objection overruled.

Exception taken by defendant.

A. The surplus as stated in the books August 31st, 1902, was $24,005.80. Upon my computation to
725 which I have testified there was, instead of a surplus of $24,005.80, a deficiency of $85,042.85. I have examined the books to ascertain as to how this dividend of $46,250. was paid, that is, the source of it. It was paid out of capital.

To THE REFEREE:

That dividend was declared January, 1902. The amount of it was $46,250. And the percentage five per cent.

To MR. LITTLETON:

726 The dividend of $46,250. helps make that $85,042.85 deficiency.

To MR. STRONG:

It is embraced in it. The deficiency before the payment of the dividend was $38,792.85, and the payment of this dividend makes the deficiency $85,042.85. I find that there is an entry among the assets, Tennessee and Alabama Mineral Railway Construction $49,089.94, as of August 31st, 1902; and I find a reference to this in the minutes

727

in a contract. It was a guarantee of construction of this railway by the United States Iron Company. The contract was with a contractor.

The witness refers to pp. 30-38 of minute book, Plff's Ex. 46. I find from an examination of the books that that item of $49,089.94 is included among the assets of the United States Iron Company. So that, according to their books, in arriving at their estimate of their resources of $24,005.80 as a surplus, they have taken into account as one of their resources this $49,089.94. That $49,089.94 was paid out for 728
the construction of this railway. In my estimate as to the resources of this Company for the purpose of valuation of the stock I considered this $49,089.94 an expense, not an asset. In my opinion as an expert accountant the $49,089.94 should not have been treated as an asset. The origin of this expenditure was the contract of guarantee, a liability, and should therefore be treated as a liability in the original instance. It should have been included among the liabilities as such. That liability would be reduced by the payments for this construction, which would be charged against that liability, as an asset, if you like, and wipe the 729
liability out, so that there would be neither an asset nor a liability. So that if this was included in a statement of assets and liabilities in any way at all it ought absolutely to have been first put in as a liability. And then, that liability having been discharged, that amount would be put in as an asset, so that the two would simply counterbalance. There is no stock ownership in this railroad that I find in the books, there is no apparent ownership, there is simply this expenditure on this railway, and it was a guaranteed expenditure

in the original instance. With respect to the depletion of the resources of the United States Iron Company I have made a computation as to the amount of such depletion and as to the earnings of the Company during this period of two years and ten months (producing paper).

MR. STRONG: That is the statement which he made from the books, Mr. Littleton. I will show it to you. I offer it in evidence.

MR. LITTLETON: This is taken under the
731 same objection?

THE REFEREE: Yes.

MR. LITTLETON: And exception?

THE REFEREE: Yes.

The paper was admitted in evidence and marked Plaintiff's Exhibit No. 64, July 14th, 1911, C. B.

This statement I have prepared for the purpose of the valuation of the stock of the United States Iron Company, based in part upon its earning capacity during that period, the first basis of valuation being the actual resources,
732 and the second basis being the earnings or the producing capacity. I have divided the earnings of this Company, and incidentally the West Point Mine and the Smith Mine because they were the two producing Companies, into four periods. So far as the land valued at $584,875.77 and the Florence real estate valued at $5,000 are concerned, from an examination of the books I find that the land was non-productive. The Florence real estate which you speak of I think was rented, but only at something like $50 a year, substan-

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tially it was unproductive. And of course so far as taxes were concerned and the expenditures necessary to look after it, etc., it was a constant source of expense. It cost over $6,000 in taxes for the period in question. As I said, I divided the West Point Mine earnings and the Smith Mine earnings in to four parts, which are respectively as follows: For the year ending October 31st, 1900, for the six months ending April 30th, 1901, for the year ending April 30, 1902, and for the four months ending August 31st, 1902. The gross earnings of the 734
West Point Mine were respectively $30,755.19, $10,239.45, $3,043.39, and for the last period nothing. It shows a constantly decreasing earning capacity, down to nothing for the last four months. Which would indicate, other things being equal, that the mine was becoming exhausted. In regard to the Smith mine, during those four periods, $7,964.56, $17,902.68, $39,973.70, $8,299.-56, the last four months being at the rate of about two-thirds of the year before, which in a lesser degree would indicate something of the same nature in regard to depletion. I find that the net profits of the whole business for the year ending 735
April 30th, 1902, according to the books were $27,300.88, and that was the best year that they had. But in that year there was nothing charged off for depreciation. There was nothing charged off in any of these years for depreciation or for maintenance, only a reserve for taxes and a small amount for bad accounts. The paper shown me was made up from the books of the Company. The paper is a statement that I have made up from the books of the Company and shows a total book value of depreciable property,

736 Marvin Scudder.

$323,495.47 on April 30th, 1901. The depreciation on the property for the two years and ten months would be about $16,174.77. $16,174.77 is even lower than 7½ per cent. per annum, it is five per cent. depreciation. I took just one-half of what I thought mining machinery ought to be depreciated at, and most of this is mining machinery. I took it at five per cent., so that the item of $16,174.77 is figured at five per cent. instead of ten per cent. or seven and one-half per cent. If that amount were deducted from the net
737 profits shown by the books of $27,300.88 for the year from August 30th, 1901, to August 30th, 1902, it would leave the net profit at $11,125 approximately. And the capital stock outstanding was $925,000. And on the basis of capital stock of $925,000 and net earnings of $11,125, the rate of earnings on the capital stock would be 1.2 per cent. return. From the examination which I have made of the resources of this Company and of its earning capacity as shown by the books of the Company, I am able to give my opinion as to what would be the value of this stock under the conditions shown by the books.

738 Q. State what that value is.

MR. LITTLETON: That is objected to, if the Court please, on the ground that it is based upon absolutely inadequate and insufficient foundation, purely speculative, not competent to bind this defendant, and it is immaterial to the issues joined here between the parties.

MR. STRONG: It is very material.

THE REFEREE: I think I will take that, Mr. Littleton, in connection with the whole explanation and examination.

Exception taken by Mr. Littleton.

A. Not over fifteen per cent.

THE REFEREE: Of course it is a conclusion, but we will have all the facts upon which the witness bases his conclusion.

MR. STRONG: There were two tabulations which Mr. Scudder used which were not marked. I offer them in evidence now.

MR. LITTLETON: Same objection.

THE REFEREE: Objection overruled.

Exception taken by Mr. Littleton.

The papers were admitted in evidence 740
and marked Plaintiff's Exhibits Nos. 65 and 66, respectively, July 14th, 1911, C. B.

CROSS EXAMINATION by Mr. Littleton:

I have in my hands Plaintiff's Exhibit 63, being the balance sheet of August 31st, 1902. It is a statement taken from the books, with some corrections made by me. The changes that have been made as regards this balance sheet, as I see it, are the depreciation reserve and the deficiency accrued since incorporation. As to whether I didn't also take out an item for the payment for 741
the railroad work, $49,000, in my answer just given the answer to this question is included. It is included in the $38,792.85 deficiency accrued since incorporation, that is the balance. In reaching my $38,792.85 I had to go through the process of subtracting or eliminating the forty-nine thousand and odd dollars which was paid for the railroad construction. It is scarcely accurate to say that this statement is taken from the books, unless you take out the deductions which I have made. This balance sheet of August 31st, 1902, is the basis of some of the points that I made. I

would not call it the basis of this whole testimony. It has gone in the record here as the balance sheet of assets and liabilities, as of August 31st, 1902. I put on there from my own observations and opinion an item of $59,958.71, as a depreciation item. I also used, in order to reach the figure of deficiency accrued since incorporation of $38,-792.85. I also subtracted or taken from the assets the item that appears upon the books of $49,-000, for the building of this railroad. So that this balance sheet of August 31st, 1902, as it now
743 stands here has in it my subtraction of $59,958.71 for depreciation and my subtraction of forty-nine thousand and odd dollars on account of the building of the railroad, from the assets. That does not appear on the books of the Company. In order to reach the results which appear here in this August 31st, 1902, balance sheet, which I do reach, it was necessary to subtract these two items from the assets of the Company. I mean, actually and analytically by depreciation, in this case that there is a certain wearing out of machinery which cannot be prevented by up-keep, maintenance, and there is a certain antiquation,
744 if I can use that word, of machinery which may bring a machine down to be worth nothing in a certain number of years by the incoming of some new machinery for the process, and that wearing out of machinery and antiquation of machinery I call depreciation. I do not calculate any depreciation on the land. Depreciation, literally and technically applied, applies in this instance I am talking about now, not general discussion,—applies to machinery, but in explanation I wish to state that I have tried to take the shortest road in explaining my figures and if I have used "de-

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preciation" in a somewhat wide sense, it has been with a view not to confusing the reader of my testimony. The answer to your question in regard to depreciation on land, I say, technically, no; but in the use of that word in this testimony I have tried to cover depletion. As I recall my testimony, I think I used the word depreciation in cases where I also referred to depletion. That item which is marked "less depreciation, $59,958.71," which is a deduction of mine which I have made from an examination of the books, I did intend that depletion was to be included in 746
that figure and also what maintenance had not already been charged out. If I said in the record there was no maintenance charged out. Then it must include maintenance. If I said that the books disclose there had been absolutely no charging out of anything for maintenance that is true, because this is the only depreciation, depletion or maintenance besides what is shown in the books that I have presented.

I recall that I said that in that year there was nothing charged off for depreciation. There was nothing charged off in any of these years for 747
depreciation, for maintenance, or for reserve, anything of that kind, only reserve for taxes and a small amount for bad accounts, and if I did say that I made an incorrect statement, in a small respect. There is a small charge for repairs and equipment that I overlooked when I made that statement. I wish to correct that statement to the extent of not over $3,000 for the total time, and it does not affect my testimony in any respect because that had already been charged out and shown in this balance sheet. It just does not happen to be stated in that statement exactly to

the minute correct. I think I include both depreciation and depletion in that item of $59,958.71 as well as maintenance. The amount allowed in that item for depreciation of machinery can be readily seen by the books. I think that half of the mining assets were machinery. I think it should be 10 per cent., but I said 7½. I would have to figure out for you what part of this $59,958.71 is allotted to depreciation of machinery. I would say off-hand approximately half. The remaining part of that I would allot to depletion,
749 less what should be charged to maintenance. I cannot say what should be charged to maintenance without going over the whole matter again. I made these figures. I made my calculations of 7½ per cent. on the whole matter. If I went into detail in regard to it, the figure would be larger, I am sure.

My calculation was based on the knowledge I have of the wearing out of mining machinery and the general appearance of the sales as compared with the assets. As to whether I can tell the Referee what part of that item of $59,958.71 I accurately figure out, from the same expert stand-
750 point, should be charged to depletion, I would like to answer that question in this way: the assets of those two mines are carried on the books at less than $300,000. The gross earnings of the material from those mines sold at $100,000. There is at least 33 1/3 per cent. apparent depletion of those mines in that period. Now, when I say 7½ per cent., I think I am very conservative. I don't know the first thing about those mines. I have not had an engineer examine them. I can make a pretty good guess about the tonnage of those mines from the basis of what the books show; but

751

I am guessing from what is arbitrarily written on the books. The only possible way I can figure the tonnage of those mines is from the figure of assets at which they stand on the books. If they are capitalization figures they are incorrect. They should be cost figures. I did not take the arbitrary statement on the books of the value of those mines at the time of purchase, and then the subsequent capitalization of the Company, and by that arrive at the tonnage contents of the mines. I haven't arrived at the tonnage contents. I arrived at a basis of valuation of the depletion 752
charge, as shown by those figures on the books. My depletion charge depends upon what the ore tonnage is, as to how much should be charged—the lifetime of the mine is to be determined by the ore tonnage. I haven't seen any engineer's report or any estimate of ore tonnage or the lifetime of the mine. I didn't say that I worked out the depletion charge as being one-half of $59,958.71. My recollection is that I did not say that about one-half of $59,958.71, which is marked "Less depreciation reserve" I allotted to depletion. I didn't actually say how much of the $59,000 should be charged to depletion, except by sub- 753
tracting from it what should be charged to maintenance, that is what I recall. It is the fact, according to my figures, that the 7½ per cent. charged off under this item which is necessary to make the $59,958.71, that by that process I would have exhausted the mines in ten years—that is, it is correct to say that in computing the depletion of the mines here I have figured 75 per cent. for ten years, that is 7½ per cent. a year, but you would have 25 per cent. left. I don't know how long the 25 per cent. would last, under my calculation. I can tell something about how long the

754 Marvin Scudder.

25 per cent. would last. According to the books, at the rate they were going, the whole thing would not go ten years. In order to verify my depletion item, I do not have to arrive at the final conclusion that the mine would have been exhausted in ten years. I have allowed the mine to be 25 per cent. of its value at the end of ten years. I don't know how long the 25 per cent. would last. I did not say a moment ago ten years would be the lifetime of the mines. At the rate they were going, they would not go ten years, that is exactly what
755 I said. Not having any estimate of the tonnage at the time, and having no engineer's report or advice on the subject, I am not willing to swear that the lifetime of this mine would end within a period of ten years, at the rate they were going, according to the books. In my opinion, I think from the books that if sales were made at the rate of $100,000 in three years, that the mines, as represented by the books at $300,000, might become exhausted before ten years. I would not say as an expert accountant that the fact that there is entered on the books of the Company this item "West Point mine and properties $45,287.09" and "Smith
756 mine and properties, $236,537.22"—that I accepted that as the basis of the ore value of that property. From my experience and observation, the only reliable way to get at the ore value of that property would be to check up the figures as they appear on the books to see if they have been put in the books correctly; to see if the figure that is represented on the books was the actual value of that property at the time it was purchased. I would not attempt to get at the actual ore value myself. I would, if I had the say about it, employ an expert to do that. That isn't the only way you can really get an estimate of it, by expert esti-

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mates by men who have made tests and expert experimentation. Not if you can prove that this is correct. I don't think it is for me to say how I am going to prove that this is correct except that way. I am accepting these figures as the valuation of the mines. I cannot say how you are going to get those figures. I am accepting them as is well known, but it would be better if they could be checked up, examined by an engineer. As to whether these items which we have just been talking about, the West Point mine and the Smith mine, bear no relation to the actual amount of ore 758
and are not supposed to bear any relation to the actual amount of ore in the land, but is simply the cost price which was put down in the books against which stock was issued; the evidence that has been given shows that those figures are entered on the books against certain stock issues—the purchase price. I don't say that they are not to be taken as bearing any relation to the ore values, or the land. I should certainly say they are to be taken as indications of the values of the lands. I don't know of any better basis to start with than the price that one man will pay for a thing, to get at the value. 759

As to how I got my basis for depletion I think I have pretty clearly stated that the 7½ per cent. was simply an estimate on the whole assets, depletion, depreciation and what maintenance as has not been charged. I have stated that my opinion that the mines could not last at the rate they were going ten years comes entirely from the assets as developed by actual figures in these books. I may be entirely wrong about it, but I have taken it from actual figures as they are shown here on the books. I should think it would

have been an idle venture to have organized a big company and have gone down there and exploited the mines and built blast furnaces, if these items which I have relied on as a safe indication—a safe guide in determining my values, and if, as a matter of fact, this company was to peter out in ten years, so there would be nothing of it—swallow itself, so to speak. It is the fact that any such deduction for depletion could only properly be made after a thorough expert investigation of the property and an estimate of the
761 life of the mines; that is how long it would take to remove all the ore from it, that is the reason I did not put the figure on separate items but only made an estimate as I found it, from the books. I think it might hold water if you put it in separate items. In taking my figures I have not had the benefit of any such facts; that is, of a thorough expert investigation of the mines. I mean by maintenance the cost of up-keep, repair and replacement of equipment. In figuring the depreciation, including maintenance and depletion, which I say should have been charged against the
762 earnings for the last year, prior to August 31st, 1902, I have taken the figure at 5 per cent. As I recall it in estimating the value of the stock in the last instance I don't know that in my opinion it would have been more just if I had determined the depreciation, depletion and maintenance separately, instead of lumping them together, as I have done. It would have been more explainable. If the Company properly maintained its equipment, charging all maintenance, replacement and even additional equipment to operating expenses, I should still say that the Company should provide yearly not less than 7½ per cent. of the total

value for depreciation. I have made an allowance for the withdrawal of the item of maintenance from it. I figured 7½ per cent. on the West Point mine and the other mine. I haven't been figuring the 7½ per cent. on that vacant land there. If all maintenance and replacement and even additional equipment is charged to operating expenses, I think I would still say that the Company should provide yearly not less than 7½ per cent. of the total value for depreciation. By saying that this $59,958.71—one-half of it is depreciation of machinery and the other half is 764
divided between depletion of the ore lands and maintenance I mean exactly what I say.

Q. Then you did not count maintenance, if it is charged to operating expenses—you did not count that—there would have to be a withdrawal from the 7½ per cent. charged yearly? A. The 7½ per cent. represented there by that is not shown on the books in a depreciatory character.

Q. Depletion, depreciation and maintenance? A. Yes, sir.

As to whether if maintenance was charged to operating expenses there would have to be a 765
subtraction of 7½ per cent. I would state there might be an addition to the depreciation that should be put on the books. It would not be possible, under a policy of charging all maintenance, replacement and additions to operating expenses, that the equipment as a whole would actually appreciate rather than depreciate. I know nothing more than what is indicated on the books about the policy of this Company in regard to whether it charged maintenance and additional equipment to operating expenses. It's the fact that the question of depreciation is

largely a matter of opinion or policy. I have known in my experience of no mining company that I recall which made no provision beyond charges for proper up-keep and replacement. I found upon my examination of the books of this company, a large number of charges under the head of operating expenses. I do not say that these books of this Company do not show anything for maintenance and up-keep—no charges for maintenance or up-keep; that that has not been offset against its assets at all. I said heretofore in my
767 testimony just that, that the books did not show anything for depreciation, didn't show anything thing for depletion of ore mines and didn't show any charging off of anything for maintenance and then made a correction to-day that there was a small amount of repairs on equipment.

There may be a large number of items. I call $22,433.37 in this Company a pretty large item. $28,940.09 is quite large. And $15,389.48 is large. And $13,940.64 is also large. I don't recall that those items appear in the books of this Company. If these items that you have read to me do ap-
768 pear in the books of this Company under the head of operating expenses, and they were expended for the purpose of up-keep and maintenance and additions to the equipment of this concern, and the operation of it, if they actually spent that and charged it to operating expenses my testimony would be incorrect. It is incredible that a company like this could run a mine two years and ten months without any expenditures whatever in maintenance. I found on my examination of the books that various charges had been made for pay roll and supplies. There were some items. I

don't know what you call large. I don't recall that I found pay roll of the West Point mine, from November 1st, 1899, to July 1st, 1900, $22,-433.37. I may have found it.

Q. If you found that item you must have seen it—did you go into the question in the examination of the books, far enough to find out—did you examine vouchers to ascertain the items of what made up these charges for pay-roll and supplies? A. I never saw any vouchers.

Q. Didn't you find also that the same company expended—that there was, for supplies, an item 770
of $4,755 for the West Point mine—distinctly stated "For supplies?"

A. I cannot recall those figures as you call them off to me. If they are given to me—

Q. They have been taken from the books. A. When you call off a thing of that kind to me, Mr. Littleton, I cannot answer it, I might as well tell you right now, and I do not think anyone else could.

I did not when I found an item such as you have read to me or any other item charged in the operating expenses, such as supplies, I did not go and find the voucher to determine what the sup- 771
ply was. It is possible that these payments for pay-roll and supplies include items for labor and material which were in fact maintenance charges. I won't say that it is probable. I say the proper estimate for depreciation of buildings and plant and machinery, assuming that repairs were charged for, as is generally known, is 10 per cent. I wouldn't say 2½ per cent. on the buildings and 5 per cent. on the machinery would be adequate. I would say 10 per cent. on the machinery. I supplied here Plaintiff's Exhibit No.

66, known as depreciable property, special report on United States Iron Company, April 30th, 1901. There was an item, the Tennessee and Alabama Mineral Railroad, construction cost $49,089.94. I say that was wrongly allowed as an asset of the Company and ought to be and was in fact a liability. It is true that yet in my schedule of depreciable property that thing heads the list. I don't think it should be there. I knew about it at the time. I put it in there because it was an asset on your books, or these books, and I took
773 the assets just as they appeared on the books. I do not believe it is accurate to depreciate that item. My testimony shows that I did not think it was an asset, but in figuring this 5 per cent. I did treat it as an asset, as the books have treated it. I think it fair to include in the statement of depreciable property the land value of the West Point mine at $25,000 and the land value of the Smith mine at one hundred and one thousand and odd dollars as a mine value. I take these as mine values, $25,000 for one and $101,000 for the other. That is what it says. It says so, on the books. West Point mine and properties, it says, and
774 Smith mine and properties. Because it says that, I certainly took it as the mine value. If it was land value in fact I could not figure any depreciation on it, if you mean by land value the surface. Land value in coal properties may be the coal under the land. Regarding depreciation as separate from depletion, it was quite proper in the sense I used it to include this real estate under the head of depreciable property. I used the word "depreciation" in the sense of depreciation, depletion or maintenance not appearing on the books, as I have already testified. To the extent

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that I used maintenance as not appearing on the books, I have corrected the testimony to the extent of a small amount.

I said not over $3,000. I think I have examined all the books sufficiently to be able to stand pat on that proposition. I don't know that I had any authority for taking that balance at the end of two years and ten months period and calculating the depreciation backwards over the period there. I simply did it. I certainly do think that is good accounting if there doesn't appear any depreciation or depletion that has been charged.

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Q. If you were to attempt to make such depreciation reserve, should you not have taken the balance at the beginning of the period and used that as a basis, giving due consideration to such additions as were made during the period and on which depreciation for the whole of the two years and ten months would not run? A. I could have done it in that way.

Q. Would not it have been the fair way to have done it—more accurate—supposing a whole lot of this stuff had been added in the second year; half of it, say, on which you calculated depreciation for two years and ten months, don't you see your backward steps would have caused you to reach a figure for depreciation which was too high? A. There wasn't any change in these properties.

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I can tell from these books whether there was any change in conditions. The assets do not appear to have changed materially during that period.

Q. That isn't an answer to the question I want. Isn't it the fact that when you took the balance sheet at the end of two years and ten months

778 and went backwards and calculated depreciation in that fashion, that if there had been or were additions to the property two months, six months or a year, or a year and ten months before the balance from which you figured, your balance or calculation would be just that much incorrect?

A. Certainly, that should be done, of course if there had been a change.

I think it is fair as I have done it to charge depreciation for the period of two years and ten months upon tenement houses, store,
779 stables, laboratory, laboratory appurtenances and supplies, telephone lines, live stock, wagons, and horses. They were not to be kept up out of operation on the 28th Street horse-car line, as audited by Haskins & Sells. The 23rd Street Crosstown line has charged in its balance sheet horses as assets. They were not paid for out of operating expenses. I am just quoting authorities on the rate of depreciation; 5 per cent. might be fair to charge on tenement houses, stores, stables, laboratories, appurtenances, supplies and live stock. I don't say that in the case of live stock, wagons, horses, etc., it would have been better
780 and fairer to have made no charge for depreciation and that in the case of buildings that 2½ per cent. would have been sufficient. I took off a balance sheet of the United States Iron Company as of October 31st, 1900, and I took off a balance sheet as of April 31st. I did not make a balance sheet of the United States Iron Company as of December 31st, 1901. Without a balance sheet of December 31st, 1901, I certainly would have knowledge of the exact condition of the Company on January 8th, 1902. I certainly would. As I recall the date, April 30th, 1901, is the nearest

balance sheet to December 31st, 1901, which I took off. Certainly I did not take a balance sheet off every month. It is true that from April until December 31st, 1901, I took no balance sheet. A dividend was declared January 8th, 1902. I will call it as of that date. I have the knowledge of one who has examined the books as to the exact condition of the Company on January 8th, 1902, when the dividend was declared; the knowledge of one whose last balance sheet was taken in April, 1901. I had before me no statements of the net profits of the Company on December 31st, 1901, except the figures that I had taken from the books myself, and the examination of the books. I don't know that I had before me any statement of the net profits of the Company on December 31st, 1901. It is probable that it was the condition of the Company at that time upon which the declaration of the dividend was based. I have stated that the dividend declared on January 8th, 1902, was paid out of capital. I should say the books show this to be the case.

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If the Company had a surplus on that date which exceeded the amount of dividend, I would not state that the dividend was paid out of capital. I don't know whether or not it is the fact that the Company had sufficient cash and made no sacrifice or sale of assets to meet this dividend. I would have to examine the books to answer that question. I have examined them. I did not base my assumption that the dividend was paid out of capital upon the figures shown by the balance sheet of April, 1901, when the dividend was declared January 8th, 1902.

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The figures of August 31st, 1902, I had that as a balance sheet. I had them all. I think it is

784 Marvin Scudder.

necesary, in order for me to substantiate this statement, that the dividend was paid out of capital, to reduce the Company's assets by $59,958.71 for depreciation and to drop entirely the cost of railway construction of $49,000. The books showed that the construction of this Tennessee and Alabama road was actually made, that is, the money was actually paid out and that it was considered to be beneficial to the United States Iron Company, that is only rumor. So far as it has been told to me, that is resolved in the minutes of the
785 Company. I did not go by the minutes of the Company so much as by the books of account which you were referring to.

I do not say there was $49,089.94 appearing as assets of this Company which ought to be a liability, and that it is the amount of money which the Company spent on the guarantee of Quigley, the contractor, to build this particular railroad. I think you have got that a little wrong. That is, I mean you possibly misunderstood me. The Company guaranteed to build that road, and as they spent that cash on this road their guarantee was
786 taken down, so that it resolved itself into nothing at the end of the time. They had never placed a contingent liability on their books; the evidence from the books shows that the money was actually spent and was put into this property, but, at the end of this time, I cannot find from the books that this Company was the possessor of that particular property.

The Company obligated itself to spend this money on this railroad. They obligated themselves for an unknown sum. It is therefore contingent, as to the amount of it. They do put something down on the books that is not known,

they do not in this case. I mean to say if it was not known how much there would be there, you could write down on the books the liability of the Company and make an entry of its liability, set up a reserve for such liability. I would say $60,000 or $70,000 or $100,000. The asset that balanced it would be whatever you gave the guarantee for. You cannot have a liability without getting something for it.

The mining company engages to spend an unstated sum upon the railroad and as the work is done the vouchers come in, or the bills, and they 788
are paid by this Iron Company. And they are paid to the extent of $49,089.94, and it is put down in the books of the Company as an asset. I don't know that it is the fact that if the Company did the construction work under a resolution of the directors that it was beneficial to the Company, that they would either have the railroad itself or a lien upon the railroad, or an interest in it, or claim upon it which would justify them in writing down the $49,089.94.

I have said that it ought to be taken out. I have taken it out and I have taken out this depletion and depreciation of $59,958.71. I don't 789
know that it is so that by adding the two together I am able to say, and it is the only way I am able to say that the dividend was paid out of capital. I think that has aided me in arriving at that figure. There may have been other items. I think now that this $49,089.94 is improperly entered upon the books of this company as an asset.

Q. Would you consider this item of railroad construction an expense if the Company had a claim against an individual or other company for which it was guaranteeing the performance of

790 the contract? A. I treated it just as I would an advertising expense.

Q. A railroad is an advertising expense? A. I would treat it just as I would advertising expense.

In this case I mean to identify the building of a railroad to a mine as an expense to be treated in expert accounting as I would an advertising expense in this case, because it was money spent for the benefit of the Company, not because it is necessary to do that in order to declare a dividend out of capital in this case. They did not gain any

791 ownership benefit from that $49,000.

I know from what I have seen. I never have been there. True enough I don't know anything about it except these dry old books. The directors resolved that it would be a benefit. I don't know that I know more about it than they did. I would not dare say I did. I say in the original instance the cost of this road construction should have been treated as a liability. That is my testimony. I don't know what I would then set up in the original instance to represent this liability. As a matter of double entry bookkeeping, to make such a credit to a liability account, it would have been nec-

792 essary to make a similar debit to some asset account or to profit and loss? You could charge profit and loss before the loss was determined. I should charge reserve to profit and loss. I don't know what I would write down in the book. Whatever you wanted to write down that would indicate what you wanted to say. When I keep books I keep them with figures. You would have to put the same item on the asset or the profit and loss debit side that you put on the liability. If you hadn't determined the loss you could put down a figure. You would put down the same figure you would put on the other side. The figures you

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would put on the other side might be fifty or sixty thousand dollars. Certainly, just a guess. You would have to guess at that time. That would be taken care of in the final figures by adjustments. This was a contingent liability, this credit. Sometimes such contingent liabilities are shown on a company's balance sheet and sometimes they are not. If in the honest judgment of the directors of this Company it was thought that it would be beneficial to this Company, either in the way of increased facilities or otherwise, and it was treated as a benefit, I would say that it should have 794
been originally treated as a liability. Take all of the railroads that run into the Mesaba region carrying ore of the Steel Company, the Duluth & Range Railroad—about three of them, carrying it down to the Great Lakes. I don't know that I would count their construction on behalf of the Steel Company as advertising, to be charged to advertising; I don't know that particular case that you refer to. Suppose the Steel Company builds a railroad from a mine to the lake in order to get its ore to the boats, and it enters on its books just in this way an item, asset and liability, starting out—the 795
building of that railroad is an asset to the company. Suppose this little iron company went in and built this Tennessee and Alabama Railroad and spent $49,000 in doing it, that would be an asset if they owned it. They certainly did not own it. If they had a claim against it, I would call that an asset. There is nothing that shows that they have a claim here. As a bookkeeper and an expert, I would treat it as though they were without any claim at all. There is a contract in a claim. The books showed that they paid the bills for the construction of this road, or whatever

work was done on it—from time to time, the books showed the payment up to forty-nine thousand odd dollars. They spent the money in this construction. They didn't give it away. I don't think I would say as an expert accountant, if you had to locate in the books what the situation was, that they had a claim for the expended forty-nine thousand dollars. There is nothing that shows that they had a claim for forty-nine thousand dollars expended—that they were going to get it back. I don't
797 call it a total loss; I don't call it anything. I don't say there is a claim for that forty-nine thousand dollars. I don't see any claim there, as an accountant. Under my theory of the method in which the cost of this construction should have been charged, if the amount could have originally been ascertained and entered up as a liability, the subsequent payments would have been entered as assets and ultimately one side would equalize the other. They would have to equalize. I haven't any knowledge as to whether or not the United States Iron Company derived any benefit from the construction of this railroad except from what I
798 saw from the books, or the amounts it expended. or when, if at all, it ceased to be a benefit to the Company. I stated I found no stock or other ownership of this railroad upon the books of the company. It doesn't follow that the Company did not have some ownership or right in this road which would have justified the officers of the Company in assuming that the amounts laid out was a good investment and justified considering it as an asset. That may have been so. The records I have seen do not indicate that; but it may be so. They would probably know about it. The books show that they paid for the construction of this

railroad. I would assume, at first blush, as an expert accountant, from that they had some interest in it. I do not change my mind on reflection. Absolutely no. I am very firm in my belief. I have stated that the earnings of the West Point and Smith mines were gradually decreasing. And that other things being equal this indicated that the mines were becoming exhausted. I have no knowledge, during the time, of the other things which were equal. The figures would seem to indicate that there was an exhaustion taking place in the Smith mine. I mean to say that from those figures 800
I gave I am willing to state here, as an opinion, that they indicated to me that the mine was being exhausted, only so far as they decreased in gross income figure. It is a fact that any number of things, such as lack of capital to properly work the mine, decreased demands, increase of cost of labor and numerous other conditions might have been responsible for this decrease in earnings, and that I would have been as much justified in taking any one of these as in jumping at the other as the conclusion most favorable to the plaintiff's side of this action. My statement is based entirely on exactly what I said, what the earnings show- 801
ed in decreasing. I don't know that this Company had to have a bond issue afterwards. I think you are referring to another company. The successor. I should think that the United States Iron Company, not having ready capital, might do something towards making the output small. I think it is fair to estimate, in regard to the West Point mine, without an engineer's report, and have it be relied upon in matters of importance, that that mine was or has become exhausted. In regard to the Smith mine, I think there ought to be an expert opinion and an examination of the prop-

802 Marvin Scudder.

erty. I should say that without an engineer's report, in regard to the Smith mine, I cannot tell—in regard to the West Point mine you can tell, by looking at the books, without an engineer's report, that there is exhaustion taking place, if the books are correct. I think if a proper engineer's report showed that the value of the ores in the ground were far in excess of those shown on the Company's records, I would be justified in adding this excess to the Company's assets. I think it would be proper to credit the surplus account with this
803 excess. If so, without a valuation of these assets of the Company can it be said definitely whether or not there was a surplus or a deficit. If the books are incorrect, of course I cannot tell whether there is a deficit or surplus. That is my answer to that question. Referring to my statement of depreciable property, Exhibit 66, I have stated it was, most of it, mining machinery. Looking at Exhibit 66 I will have to correct the opinion that most of the property included in this statement is mining machinery, to a certain extent, but not to a very great extent. Not quite 50 per cent. is mining machinery. If I stated that most of it
804 was, I said that.

If that is what the record shows I made a mistake in that respect. A large part of it is mining machinery. In order to make up a deficiency of $38,792.85, as I have testified, between the receipts and expenses of the Company, it is necessary for me to include as expenses this depreciation of over $59,000 and the cost of constructing this railroad of over $49,000.

My valuation of the stock at 15 is based upon the property of the Company and its earnings, as reduced by the depreciation shown by me, but I do not say that is not coupled with other things

that I have seen in this examination. That 15 per cent. is based, as you know, on the earning capacity as taken from these figures; but I naturally took into consideration assets and liabilities and other things, as I saw them on the books, and my experience in valuing securities of that kind. I based it on the earnings for the period of the Company's existence. I mean I made an actual calculation for the two years and ten months and used that as the period to calculate the value of the stock at 15. I think the testimony shows that. I think I have figures that I made on that subject. 806 I took the earnings for one year, $27,000, as shown by the books, and subtracted $16,000 from the $27,000, the $10,000 being the depreciation, as I have described it here in my testimony. You are correct. The 1.2 per cent. earned was for the year ending April 30th, 1902, and it was on that basis of earnings taking par at 8 per cent., that I arrived at the value of 15 per cent.—not over 15 per cent.; and from the net profits, $27,388, I took off $16,000 for depreciation—$16,174.77. I took off whatever it was. I think it is $16,174.77; that is right. That left somewhere 807 in the neighborhood of $11,125, substantially; I did not, by figuring what that $11,000 would be, get the amount of dividend to be paid on stock. I got the amount of earnings. That is, the gross. I figured that was about 1.2 per cent. on $925,000, and if you take the stock on an 8 per cent. basis, why, it would give pretty close to 15 per cent. In other words, I think I have to assume that 8 per cent. stock is worth par, to start with. By subtracting $16,174.77 from the $27,000 net earnings, it left $11,000, which would be 1.2 per cent. upon the entire capital stock, and therefore if the

8 per cent. is par, then this stock, with the 1.2 per cent., on that basis, would be $15 per share, or 15 per cent. It is not the fact that the $16,000 which I subtracted from the $27,000 is made up of my $59,000 depreciation, as I have described it here, and the $49,000 which I say was a wrong charge to the assets. I don't say that I charged depreciation on the $49,094, which I admitted was an error. I certainly say, after I call this thing a liability, I can then classify it as depreciable property.

809 You have treated it on those books as an asset, and therefore it is a thing which may be properly treated as depreciable; but I say it is a liability. At the time I made this figure of $16,000, I was including that $49,000, and I took every depreciable asset on the books. Now, that does not include the $59,000; but the $49,000 is in there, and if you will figure it out it don't amount to a row of pins on the 5 per cent. It is not one of the largest items of depreciable property I have got here; it is the third largest item I have got here.

Q. And you put it in and classify it as depre-
810 ciable property, and in the same breath tell us it is a liability. A. I did not consider it so. I have already testified in regard to the matter several times.

I will fix the time when I think the stock was worth 15, at about August, 1902.

Charles C. Cluff. 811

CHARLES C. CLUFF, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

DIRECT-EXAMINATION by Mr. Strong:

I reside at 278 Gates Avenue, Brooklyn. I am manager of sales of the Carnegie Steel Company, Illinois Steel Company and Tennessee Coal & Iron Railway Company for the New York district. I have been in the steel business directly and indirectly since about 1881.

812

MR. STRONG: I offer in evidence here, before I forget it, the assignment of Mr. Cluff's claim to Mr. Sim.

MR. LITTLETON: That is taken subject to an objection made earlier here.

TO THE REFEREE:

It is an assignment executed by me.

The paper was admitted in evidence and marked Plaintiff's Exhibit No. 67, July 14th, 1911, C. B.

813

To MR. STRONG:

I am acquainted with the defendant William Edenborn. I have been acquainted with him, I should say at least twenty-five years. I knew what his connection was with the wire business. He was quite prominent in that business. In later years he was reputed to be quite a wealthy man.

Q. You mean his wealth ran up where?

MR. LITTLETON: This is all taken subject to objection, if the Court please. It is ob-

jected to on the ground that it is incompetent, irrelevant and immaterial.

THE REFEREE: Objection overruled.

Exception taken by Mr. Littleton.

A. Well, it ran into the millions. For a short time only I was connected with a company with which he was connected. That was The Iowa Barbed Wire Company of Allentown, Pennsylvania, which is now one of the plants of The American Steel & Wire Company. I do not remem-
815 ber his position in that Company except that he and Mr. Gates and Mr. Clifford bought a controlling interest in the Iowa Barbed Wire Company. He was one of the head men. I was Secretary of the Company, if I recollect, at that time. Mr. Edenborn's reputation for general business ability and business integrity, was very high. I had confidence in him and believed in him, believed what he said to an unlimited extent, in fact I never questioned anything he told me. I became a subscriber to the Blast Furnace Syndicate of which Mr. Edenborn, J. C. Walker and August Man were syndicate managers. I first heard of
816 that syndicate when I met Mr. Edenborn in a brokerage office, and he asked me to go with him over to his office. I do not know when that was, shortly before I signed it, probably a week before April, 1902. It was about the time the syndicate agreement is dated, April 15, 1902. I met him around about that time in a brokerage office. He spoke to me, I knew nothing about it up to that time. We talked about general conditions. He said to me that if I would come over to his office with him he would show me something that I could invest my money in, that it was better than any

of the stocks, and that I could put it away in my box and forget it. He said something about who was going into it. I went with him to his office and he showed me the syndicate agreement, which I looked over. He did not tell me anything about his friends going in it down at the broker's office, but after we got back to his office. He showed me the syndicate agreement, and I looked at it, and he told me that it was a good thing, and he made a special point of the fact that nobody was making anything out of this thing, that every man was putting in his dollar with everybody else. I do 818 not think we went into those particulars as to what it was organized for, to buy anything special any more than what was stated in the syndicate agreement. Personally I did not pay very much attention to it. About advantages, he said that nobody would have any advantage over anybody else.

He said they were going to acquire some iron properties and put up blast furnaces and make pig iron. He said this was a very valuable thing. And my recollection is he stated they were going to take in some iron properties in the South, that 819 they had been looked over and considered valuable, and they were going to erect these blast furnaces in order to utilize that ore. That was substantially what he said. He showed me the syndicate subscriptions. There were some names attached there. I told him I would look into it and see him the next day, or about that time. He most highly recommended it. Certainly I said something to him on that subject. I asked him if he recommended it. And he said he did. The fact of the matter is I did not pay much attention to the details because my confidence in

Mr. Edenborn was of the highest, and whatever he said to me was sufficient without my looking into it. Up to that time I had never heard of the United States Iron Company. At that time I had no knowledge that he was interested in the United States Iron Company. He did not tell me at that time or before I had paid my subscription, and I did not hear that he had any personal interest in it. My recollection is when that suit of Heckscher came up I heard that he had an interest in the United States Iron Company. I did not know
821 August Man at that time. I never knew or heard up to the time that I speak of the trial of the Heckscher case, as to how Mr. Man paid in his subscription. I never knew or had never heard, up to the time of the Heckscher case, how Mr. Ellwood paid in his subscription. And the same as to the Williams estate. I did not know or had never heard up to the time of the trial of the Heckscher case how Mr. Edenborn had paid in his subscription. I paid in my subscription as they were called. In subscribing to that syndicate agreement I believed what Mr. Edenborn had told me
822 and absolutely what was stated in the syndicate agreement. I relied upon his statements and the statements in the syndicate agreement when I paid my subscriptions. I certainly should not have made that subscription and paid in the amount of my subscriptions if I had had knowledge or information to the contrary. I had a conversation with Mr. Edenborn before I became a subscriber to this syndicate agreement at which Mr. Sim was present. When I went over to Mr. Edenborn's office and looked at this, I said I had a friend by the name of Mr. Sim and I would like to have him also look into this, look into it with a

823 view of going into it, and Mr. Edenborn said that was agreeable. And Mr. Sim and I, as I recollect it, returned the next day and saw Mr. Edenborn, resulting in our subscribing. He repeated just what he told me the day before. That this was a good investment, that everybody was going in on the same basis as everybody else, that nobody was making a dollar out of it, that everybody was putting their dollar in with everybody else's. That is substantially the substance of what took place. He said that in the presence of Mr. Sim.

824 Q. Did he say anything about there being no special advantages to anybody?

Mr. Littleton.—I object to this as leading. The witness has tried to state what happened, and the counsel has stopped him repeatedly.

The Referee.—I think the question is proper enough.

Exception taken by Mr. Littleton.

825 A. He said this was something that would be a great investment, something that we could put in our boxes and forget all about, and that nobody was making a dollar out of this, that every man's dollar was going in there with every other man's dollar, that nobody had any special advantages or would have, and that it was a good thing and he recommended it.

I do not recollect whether Mr. Sim said anything. I said, "Mr. Edenborn, if you recommend this, as you have, I am willing to put in $15,000;" and subscribed or signed my name to the syndicate agreement for that amount. Mr. Sim said the same thing, and signed his

agreement for the same amount, signed it then and there. I signed the agreement absolutely based on my confidence in Mr. Edenborn and on those statements. I never got any information which led me to investigate this matter until they brought out a bond issue. That was when I received a circular dated September 25th, 1903, relating to a bond issue (Exhibit 8). When I heard of this Heckscher suit, with Mr. Sim I called at your office and went over this case; we stated what we had learned,
827 and wanted to find out what the position was. I think the Heckscher case was on trial at that time. I had no information before that time, other than that which was contained in such papers as had been sent me by Mr. Edenborn, relating to the condition of the Company and such rumors as I may have heard. An investigation was made, and a representative from your office attended the Heckscher trial that went on in Brooklyn. The information which I had upon the subject of Mr. Edenborn's connection with this syndicate and as to the operations of the syndicate was derived
828 practically altogether from the investigation made at that time and I have acquired no subsequent information except where it has been gathered for this suit by my counsel. I received statements from time to time of the Sheffield Coal & Iron Company. As a registered stockholder I received, I presume, all circulars that were sent out by that Company. I received Plaintiff's Exhibit 8. I received one of those letters of December 17th, 1903, Plaintiff's Exhibit No. 7. I also received one dated June 25th, 1904.

It is stipulated that the same demand was made as was made in the other case, exactly in the same language. 829

Cross-Examination by Mr. Littleton:

I had known Mr. Edenborn, I said, a great many years. I had been associated with the steel business for some twenty odd years, and longer. I had of course given my attention to steel affairs and steel business as such very extensively. I kept up somewhat with the steel development of the country, in the particular lines that I was interested in. Being associated with the steel business generally I keep up with whatever developments take place, in a general way. Mr. Edenborn and I had been well acquainted for a great many years. Mr. Edenborn had been very active in the steel and wire business. And as these companies merged one into another and absorbed one the other or became subsidiary one to the other in the development of the steel business, Mr. Edenborn came on up towards the top in the development until finally I think he was one of the Executive Committee of the United States Steel corporation. He was a Director, I know. I knew him to be, as far as I knew at that time, absolutely a truthful man, a man to be relied on and a man supposed to have good judgment. In other words, if he recommended an investment to me in the business in which he was engaged or in the line of business which he had the better part of his life devoted to, I would accept that recommendation as being a safe one to act upon. I should say it was customary, for men to get in with what they called the leaders in things of that sort, and 830 831

buy stock occasionally or take underwriting for the purpose of making money, like all men do. And Mr. Edenborn was generally relied on, by those who had known him or had been associated with him, so far as I know. I have stated in substance, that Mr. Edenborn met me in a broker's office, the market was somewhat unsatisfactory or uninviting, the general market, and there was some conversation about that, and I went, on his invitation, with him to his office. In substance he told me he had something there
833 which was better than the market and would like to show it to me and tell me about it. He showed me the syndicate agreement. My name appears to be signed to the syndicate agreement about midway of the names, mine and Sim's signed together. Baeckus and Moen and Cluff and Sim.

Q. And I see on there just above your name, two removed from you, Mr. E. C. Converse for $100,000. You looked over the persons who had signed this, did you not? A. My recollection of this syndicate agreement, Mr. Littleton,—that is these syndicate agreements are often made up in a number of parts, so I cannot say I saw all those
834 signatures.

Q. When you saw it it had signatures on it? A. I saw a few only, according to my recollection.

Q. I see here about five or six above you that of Thomas Dolan of Philadelphia for $250,000, and then a number for $50,000 and $25,000, and $30,000. Do you remember whether you saw those or not? A. I could not say. I say Mr. Edenborn told me that this was in his opinion going to be a very good investment, a first class investment. I presume I read the syndicate agreement, although I relied largely on what Mr.

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Edenborn said. I presume I saw in there that it was proposed to purchase the United States Iron Company of New Jersey. That is my recollection. If it is there that the Company was capitalized at one million dollars and that it was the owner of valuable iron ore mines in operation and ore properties located in the States of Alabama and Tennessee, why I saw it. I could not say. I remember it stated that it aggregated a tonnage sufficient to insure an ore supply for two or more blast furnaces for a long period. If it is there I probably saw it. If it is in there that 836 it further recited that the sum of one million dollars should be provided to secure all, or nearly all, the stock of the United States Iron Company I make the same answer to the question. I did not make any inquiry about the United States Iron Company at the time, about its stock or about who owned the stock. Mr. Sim did not. After this first interview with Mr. Edenborn it is my recollection I told him I would look into it or I would see him again about it, or words to that effect. And then I went to Mr. Sim and talked with him about it. It was generally customary on anything of that kind that I would 837 speak to Mr. Sim to join. If it is there that it was proposed not only to purchase the stock of the Iron Company but to spend the sum of $250,000. to purchase coal lands and to erect 200 coke ovens, the sum of one million dollars to erect two modern blast furnaces, and the sum of $250,000. for other contingencies, or a total of $2,500,000. I presume I saw it. I have stated in substance all that Mr. Edenborn stated to me in the first conversation when I went from the broker's office. He simply told me he thought it was a good

investment, that everybody's dollar was going in against everybody else's dollar. That is practically what he said. After talking of it together I and Mr. Sim went together to see Mr. Edenborn about it. I only had two interviews. At the second interview he repeated what he had said at the first to both of us, to Mr. Sim and myself. Mr. Sim and I then signed the syndicate agreement for a similar amount and subsequently paid the installments on call. Later on when the Heckscher suit was brought I consulted
839 counsel and tendered back my stock and demanded the return of my money. That was refused, and I assigned my claim to Mr. Sim. I assigned and sold it. I sold it to him. I have no further interest in it. I sold him the stock, I executed and assigned it here. When I went into Mr. Strong's office to discuss with Mr. Sim our position, Mr. Sim decided that he was going to bring suit, and I then arranged and sold him my stock so that he could collect that also himself.

Q. Well, you do not expect to share in any recovery which he might make or in any settle-
840 ment in any way? A. I have no agreement with Mr. Sim to that effect.

Q. But you know what I mean, Mr. Cluff, I am trying to test your interest in this case, to be frank with you. Do you expect that if anything is recovered by Mr. Sim on that cause of action that you would share in it? A. Well, I think it would depend largely upon what was the result of this litigation.

Later on after the Heckscher suit had been begun, I learned that Mr. Edenborn owned considerable of the shares of the United States Iron Company. The fact that he owned the shares of

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stock in the Iron Company, if it had been disclosed to me at the time I went into it, having confidence in Mr. Edenborn, as I did have at the time, in his judgment and his integrity, it would have affected me. I mean to say that if Mr. Edenborn said to me "I own a part of the United State Iron Company, we are going to take it and put some new money in it, I am going to turn in my stock without a dollar's profit on it, without any advantage to myself, and make a dollar value of that stock against every dollar that goes in; we have got good properties, and I recommend it as an investment," I am frank to say that I would have hesitated on that account. I would very probably then have looked into it. It didn't occur to me that I should look into it when it was decided to place it in a syndicate, not the way it came before me. I do not know that I am pretty shrewd in stock matters. I am still working for a living. I have been no more familiar with the stock market for a long time than anybody else. I have been familiar with the stock market; I have bought and sold stock, the same as everybody else. Every business man naturally follows the stock market more or less because of its effect on the general business. I know how stocks are bought and sold. I know how to get a quotation on a stock. I know how to look up a company. I know what it means to find out the value of shares. I was going to put $15,000 into this thing, and I did put $15,000 into it. On the face of the syndicate agreement it showed that they had decided to purchase the stock of the United States Iron Company. I never made any inquiry where it was—where it was incorporated, where its principal office was, who owned it, who controlled it, or where its property was. When I went to my

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counsel's office during the Heckscher-Edenborn suit, he sent someone over there to watch the course of that litigation. I did not go over. It was soon after the determination of that suit I brought my action, not a year.

I have stated in substance all the facts concerning the representations made to me by Mr. Edenborn; all that I can recall. I do not know about the facts of the bond issue, except as contained in the circular letter. I do not know how many bonds Mr. Edenborn took or how much money
845 he put up in order to finance the Company after this bond issue became necessary. I do not know how much he underwrote of the bonds. I do not recollect by years that 1903 and 1904 were very bad years in the steel industry. I will have to freshen up my memory to answer that question. Without looking it up I could not answer the question whether or not it is a fact that shortly after the organization of the Sheffield Company, that is 1903 and 1904, that those were two of the worst years in the steel industry in this country that I am familiar with. I did not hear Mr. Sim's testimony.

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THOMAS B. COLES, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Strong:

I am in the steel business, wire business—American Steel & Wire Company. My position there is sales agent. I have been connected with that company since its formation. I connected

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myself with the wire business in July, 1890, twenty-one years ago. I know the defendant, William Edenborn, very well. I should judge I have known him for twenty-five years at least. I worked with him. I commenced working with him in July, 1900, when I was engaged by Mr. Gates, who was associated with him, to go to Pittsburgh to take charge of the sales of the Braddock Wire Company, which at that time existed. Mr. Edenborn was of course one of the proprietors. I was simply employed. I was secretary of the Company at first and looked after 848
the sales of the wire part of it. I was subordinate to him. He was quite prominent at that time. He was one of the leading wire men of the country, so considered. His reputation as to wealth and success in business was that he had started with a very little and was making money quite rapidly at that time. When I first went with him I can hardly say what he was worth—he was quite well off. And as time went on he increased quite rapidly. His reputation at the time that I signed the syndicate agreement was that he was quite a wealthy man; supposed to be worth 849
several millions. His reputation as to business success was very good. He was considered one of the most successful wire men. His reputation then as to integrity, as to his word, was good, so far as I know. As to trusting in him, I had always implicit confidence in him, and, so far as I know, the world at large had. I cannot say exactly when I first heard of this blast furnace syndicate, involving the United States Iron Company; I think it was about 1902 or somewhere around there. The exact time I am unable to say now. I could not say definitely as to the time

of the year, what part of 1902, early or late. I had a talk with Mr. Edendorn about it. He told me he was forming this Iron Company and that he wanted his friends to come into it, that he thought it would be a good thing and would like for me to take stock in it. He said they were going to purchase some ore properties. He didn't state as to just what specific properties; but ore properties in the south. My recollection is that he told me that those properties had been paying a dividend selling the ore, and he thought by converting it into pig iron he could make more money out of it. That was the kind of business they were going into. I don't know that he told me the exact amount that he was putting in, but he told me that he was — He said everybody would come in on the same basis, so far as money was concerned. He told me he had subscribed, I think it was something like—I am not positive as to the amount—it seems to me it was $500,000 or something of that sort. I am not positive as to the figures just now. He said we were all to come in on the same basis and the subscriptions were to be called for at different times, that they were to be paid in cash. Of course, just to recall everything that he said it is pretty hard to do now, it is so long a time; but he said everybody was to come in on the same basis, dollar for dollar, and that every man's money would be alike, or some such expression like that. I do not recall the exact wording of it; that no one was to have any advantage over the other. I remember he said that every man's dollar would be alike, or words to that effect. I don't know just exactly what you mean by the basis they were coming in on. We were all to pay one hundred cents on the dol-

lar for our stock. As I stated just now, he stated that those properties had paid. He stated that they were good properties and he thought by forming the company and building furnaces and selling pig iron, they could make a good thing out of it. I had always, up to that time, had perfect reliance on anything that he said. I relied on what he said to the extent of one hundred cents on the dollar in paying for the stock. As I said, I believed everything that he stated to me. When he spoke to me about this, in the way that I have testified, and made these statements to me, I told 854 him that I would be very glad to go into it, that whatever he said—I would try to raise the money and take as much of it as I could. The only paper that I can recall that he showed me was the paper which contained the signatures for stock of other people, similar to mine, which I endorsed for a certain number of shares. It is my recollection it was a paper of the kind shown me, marked Plaintiff's Exhibit 41, that he showed me. He showed me the list of subscribers to the furnace syndicate, marked Plaintiff's Exhibit 2. I signed the syndicate agreement for $20,000. I believed the statements contained in the syndicate agree- 855 ment; as I say, I had perfect confidence. I relied on those statements. At that time I think August Mann was connected with one of our mills in Pittsburgh, and I only knew him slightly. I know of his relationship to Mr. Edenborn—he is his nephew. Mr. Edenborn said they proposed to purchase, under this agreement, ore properties in the south. He did not specify so as to identify them. I did not at the time that I signed this syndicate know of the United States Iron Company. I did not know there was such a company in existence. I did not know that Mr. Edenborn had

an interest in it. He did not say anything to me on the subject of his having an interest in the United States Iron Company. I never heard or have any knowledge as to how Mr. Edenborn intended to pay in his subscription, other than his statement to me that he intended to pay it in cash. I cannot recall the time when I first learned that he had paid it otherwise than in cash; I think probably since this trial of Hecksher against Edenborn came up. That is my recollection of it now. After signing the syndicate agreement I
857 paid the different assessments as I was called upon, until the matter was fully paid. I did not do anything else. Up to the time of what I learned in the Hecksher case, and the investigation which was made, I never knew or heard how August Mann had paid in his subscription, or as to how the Williams Estate had paid in their subscription. I never heard of them at all. I never heard or knew how Isaac L. Elwood paid in his subscription. I received a circular dated September 25th, 1903, as to the issuance of bonds by the Sheffield Coal & Iron Company. Plaintiff's Exhibit 8 shown me looks familiar to me.
858 I recognize that as the circular. I took some of those bonds. I took six thousand dollars of them. Up to that time I had never heard anything at all of these matters that you have inquired about, with respect to Mr. Edenborn's interest in the United States Iron Company and as to how he had paid in his subscription and as to how Mann and Elwood and the Williams Estate had paid in theirs. As to my receiving various communications from Mr. Edenborn in connection with the Sheffield Coal & Iron Company as to its condition from time to time, subsequent to

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taking those bonds, the fact is I saw Mr. Edenborn quite frequently, and every time I saw him he would speak of the Company being hard pressed, and he thought the stockholders ought all to come in and take the collateral bonds, and insisted on my doing it, and although it was not altogether convenient I did so. I could not say whether I received a copy of this letter which you show me or not. I presume I did. I received a number of communications from time to time. I have never received anything on account of my stock. I signed that paper.

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Mr. Strong.—I offer it in evidence. The paper was admitted in evidence and marked Plaintiff's Exhibit No. 68, July 28th, 1911, C. B.

Before I assigned my claim to Mr. Sim I caused that notice to be delivered to Mr. Edenborn.

Mr. Strong.—I offer that in evidence.

The paper was admitted in evidence and marked Plaintiff's Exhibit No. 69, July 28th, 1911, C. B.

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Cross-examination by Mr. Littleton:

I had known Mr. Edenborn for about twenty-five years. I had been living in St. Louis and Mr. Edenborn and Mr. Gates and Mr. Clifford were associated in the wire business, and in May, 1890, I was requested by Mr. Gates to go to Pittsburgh the 1st of July and take charge of the sales there, and Mr. Edenborn was, as I said, interested in the Company there. I understood the steel business generally. I cannot say that I understood the ore business. I had nothing to do

in any way with the ore business. I knew that sometimes they owned ore mills and sold the ore, and sometimes put up blast furnaces and made pig iron. I cannot say that I read every word of this syndicate agreement. I do not recall now. It has been a long time ago. The possibilities are I did rely on the statements contained in it—the chances are I did. As I say, whatever Mr. Edenborn said was—— He showed me the syndicate agreement. I do not have any recollection of seeing in there that it was proposed to
863 purchase the United States Iron Company. I didn't know from the statement "Whereas, the opportunity is afforded to acquire, for a cash consideration, the ownership, control and possession of the United States Iron Company, of New Jersey, at par" that there was a Company called the United States Iron Company, and that it was organized into a corporation and had stock. As I say, I cannot recognize the United States Iron Company or any other company. I was just simply relying on Mr. Edenborn's statement. I said I had never heard of the United States Iron
864 Company. I say I presume I read this syndicate agreement. I cannot recall now. It isn't altogether likely that I did not read it if, at the time of the signing of the agreement, I had never heard of the United States Iron Company; I might have glanced through it in a hurry. I did not ask Mr. Edenborn what kind of property they were going to purchase. I knew it was located in the south. I do not think I asked him what southern state. I did not ask him what point of development the property had reached, what shape it was in, or whether they were then held by a corporation or individually. It is my recollection I did not make

any inquiry concerning the property at all. I, as well as the other assignors and plaintiff in this action have testified that Mr. Edenborn said that every man's dollar was as good as another man's dollar, or every other man's dollar was up against every other man's dollar, and I have said that he said that no man should have any special advantages. I cannot tell you what provoked all that talk by Edenborn on that subject except to give us all to understand that everybody would be on an equal basis; there would be no rake-off, as it is sometimes termed, to those that were starting 866
it. That was my idea. I supposed that the people who were getting up this scheme did not intend to buy the property at one price and turn it over to the subscribers at another. Everybody's dollar would be alike. It had been done in my experience that groups of men had bought a property and then sold to a company themselves, getting a difference in price, and the subscribers would buy at the higher price. That is frequently done. I understand when Mr. Edenborn said there would be no special advantage, and that every man's dollar was against another man's dollar, that that 867
sort of transaction was not taking place in this thing, that they were not buying property up at one price and turning it over to the subscribers at another. That is what I understood. I presume I made my assignment in this case of my claim in exactly the same way as the others were made. Of course I have an interest in seeing if I can enforce this claim, even though I have assigned it. I assigned it to Mr. Sim with the understanding I was to get compensation for it.

Mr. Strong: I offer in evidence a letter dated June 4th, 1902, from the defendant

868 Thomas B. Coles.

Edenborn to F. H. Daniels, respecting this syndicate agreement, and showing cotemporaneous representations made to Mr. Daniels on June 4th, 1902.

MR. LITTLETON: That is objected to on the ground it is incompetent and immaterial.

THE REFEREE: I will admit it.

The paper was admitted in evidence and marked Plaintiff's Exhibit No. 70, July 28th, 1911, C. B.

869 MR. STRONG: I offer in evidence extracts from the stenographer's record of the testimony in the case of Heckscher against Edenborn, and read from the defendant's testimony in that case.

Same were admitted in evidence and marked Plaintiff's Exhibit 70½.

MR. LITTLETON: In order that the record may contain this attitude of the defendant the objection is made to the admission of these in evidence, they being notices of Alder, Sim, Cluff, Stone and Cowles, addressed to the Syndicate Managers, and being offers to return their certificates of stock in the Sheffield Coal & Iron Company, and indicating an election to return the stock and demanding the return in full of the money subscribed, etc., the one by Sim, one of the plaintiffs, and the one by Cluff, the one by Stone and the one by Cowles, in which the notice is to the effect that "I hereby notify you that I elect to rescind my subscription to the syndicate agreement, and demand the return of the money," the objection is upon the ground that not only

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by the opinion of Judge Chatfield in the Federal Court on the demurrer to this complaint, but also on the objection made heretofore by me your Honor has held that this is an action for fraud and deceit, for damages to recover for fraud and deceit, and the right of the plaintiff, therefore, if any at all, is the right to recover the difference between the value of the property at the time he bought it and what he paid for it, and this would be not a concurrent but the proof of an utterly inconsistent claim on the part of the plaintiff. In other words if he elects to affirm the contract and sue for damages, as his action now is and has been held to be, he may not at the same time elect to rescind the affirmed contract and proceed upon that theory. Therefore, these elections to rescind and claiming the entire money back are not admissible.

THE REFEREE: I do not recollect, Mr. Littleton, that I have committed myself absolutely as to what the form of this action is. There are averments in this complaint which would justify that conclusion, but whether technically it is an action in affirmance of the contract and not based upon any rescission, therefore not based on an action for damages only, why, if I have ruled I have not intended to characterize this action at all. I have admitted evidence upon both theories, because it is perfectly competent, *as I view the case, whichever form of action this is technically, to admit that proof.*

874 MR. LITTLETON: Do you mean the proof heretofore or this proof here?

THE REFEREE: Both. I will receive the testimony and give you an exception. Of course those notices commit themselves to a rescission, and if the complaint follows that feature of it, why, then they would be entitled to recover, if they succeeded, based upon a rescission of the contract and the recovery of the money that had been paid. If the other can be regarded as an af-
875 firmance of the contract, then you are entitled to recover for such damages as were sustained. It may be that the amount of money that was paid in may be a great deal more. For the present I will overrule the objection and give you an exception.

Exception taken by Mr. Littleton.

The papers were admitted in evidence and marked Plaintiff's Exhibit Nos. 71, 72, 73, 74, 75 and 76, respectively, October 25th, 1911, C. B.

MR. STRONG: With the exception of the computation of interest, that is my case.

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PLAINTIFF RESTS.

MR. LITTLETON: If the Court please, I move to dismiss the complaint of the plaintiff, first, upon the ground that the plaintiff has failed to make out the cause of action alleged in the complaint; second, upon the ground that he has failed to make out any cause of action against the defendant.

THE REFEREE: I will deny the motion.

Exception taken by Mr. Littleton.

MR. LITTLETON: In order that this question may be brought up at this time, I move

elect whether we shall proceed upon an action in fraud and deceit, affirming the contract and suing for damages, or whether he sues as upon a rescission, which his clients have already elected to make, and demands the return of the entire money paid.

Mr. Strong: This question of electing is always a matter in the discretion of the Court, and a party ought not to be compelled to elect unless the two remedies are so absolutely inconsistent and opposed to each other that by no possibility can they 878 exist together and be tried together. The issue in the case is the same whether it is an action on a rescission or whether it is an action for fraud and deceit; precisely the same question is to be tried; and there cannot be the slightest difference between the two. It only depends upon the question of whether at the outset the plaintiff elected to rescind or whether he elected to sue for damages for fraud and deceit. Upon the issue that is presented in both of those forms of action the facts are identi- 879 cal. Now, then, as the courts have held in a number of cases, an action may be brought based upon a rescission, and yet when it comes to the trial it may appear that for some reason or other the rescission was ineffectual, in which case, the facts being all stated in the complaint to justify a recovery in an action for damages, a recovery will be allowed on that ground. Those cases are quite frequent. Courts are not in favor of turning people out of court simply because the prelimi-

nary proceeding proved to be ineffectual, and when the facts are all presented upon which a recovery can be had.

Now, in this case of course you have Judge Chatfield's opinion, and you have the opinion of the Court of Appeals. If you should hold with Judge Chatfield you would hold that our rescission was ineffectual, and then you would hold with Judge Chatfield that our action was maintainable as an action for damages for fraud
881 and deceit. On the other hand, if you should come to the conclusion that the Court of Appeals were correct in its decision in this case, you would then hold that the allegations being all there for and based on a rescission, and a rescission having been made, that our action could be maintained as an action based on a rescission.

THE REFEREE: There was no motion for an election at the opening of the case.

MR. LITTLETON: No, because under the decision of the Court sending this to the
882 Referee, as I have read to your Honor, it was already characterized, by the sustaining of the other demurrer and the subsequent opinion of the Court, as an action for damages based on fraud and deceit. And I claim here, and I think we have proceeded—the record reveals the fact that, whether we said so or not, we have been proceeding upon the theory that it was an action for fraud and deceit and for the recovery of damages.

THE REFEREE: Suppose you try it as

an action to rescind, pure and simple, would the proof be competent as bearing upon that issue, and the basis for rescission, of the value of the property? Now, grant you that it was not necessary, would it not be competent to prove all the circumstances as bearing upon the issues presented?

MR. LITTLETON: I do not believe it would be competent. Your Honor will remember that at the outset, when this evidence was offered, I made my objection then on the 884
ground that the value had nothing to do with it.

THE REFEREE: And I overruled it. Is not that proof competent upon either issue?

MR. LITTLETON: I do not think so.

THE REFEREE: It would not be necessary to the cause of action, as I conceive, to prove those facts, and I think you are correct about the proposition that if the action is purely to rescind then the only proof that would be necessary would be
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the establishment of the basis upon which the Court would grant a rescission, whether it was actual fraud or constructive fraud, they hold by reason of the violation of the fiduciary relation, by reason of being both purchaser and seller of that iron stock; but as bearing upon the question of whether there was existing fraud which would furnish the basis for a rescission, would not the value of all that property, all of the circumstances, be perfectly competent upon that issue?

886 MR. LITTLETON: Well, of course I do not think it would, your Honor.

THE REFEREE: You have taken the other position. My impressions are rather against you on that proposition, and I think that in view of the course of this trial, upon which I have admitted all of this testimony, and there was no election demanded at the opening of it, and I have received the proof, I think I will not compel an election now. I will deny your mo-

887 tion and give you an exception.

Exception taken by Mr. Littleton.

WILLIAM EDENBORN, the defendant, called as a witness in his own behalf, being duly sworn, testified as follows:

DIRECT-EXAMINATION by Mr. Littleton:

I live in New Orleans, Louisiana. I am president of a railroad. Before I moved to New Or-

888 leans I lived in New York. Before going into the railroad business I was practically all my life in the wire business. I learned the wire business in Prussia. I am a native of Prussia; I was born there. I worked as wire drawer, as a mechanic, for some time; and about 1877 my boss that I had worked for eight years decided, on my recommendation, that we could make money out of manufacturing wire, to go in there, and we then started in the manufacture of wire in St. Louis. It was later incorporated. The first mill burned down before we had any chance to do anything. We incorporated the St. Louis Wire Mill Company

in 1882, I think. Thereafter the St. Louis Wire Mill Company took in other property. It took in the Continental Wire Company, the Laclede Wire Fence Company, the Benton Wire Fence Company, the Frentress Wire Fence Company, and others. And our headquarters were still at St. Louis. I remained in St. Louis in the wire business until about 1894. My position in the St. Louis Wire Mill Company was president. After all these other companies had been taken in. They were located about St. Louis, and vicinity; from St. Louis I moved to Chicago about 1894. On go- 890
ing to Chicago I was still president of the St. Louis Wire Mill Company. Yes, sir, we moved our headquarters and had our offices in Chicago in the Rookery Building. The St. Louis Wire Mill Company principal stockholders held already the majority of the stock of the Braddock Wire Company, which was another company that I had built, a new concern erected in Pittsburgh where I met Mr. Coles and Mr. Stone. Mr. Coles was a salesman of the Braddock Wire Company products; Mr. Stone was the General Purchasing Agent. The Braddock Wire Company was in-
corporated in 1887 for $100,000, increased to 891
$200,000 in 1888, and to $300,000 in 1889. Now, which one of those three years Mr. Coles came there first, that I have forgotten. One of those three years these two men—Stone was the General Purchasing Agent and Coles was the one to sell the product, but I have not in mind just when they came into that Company. The Braddock Wire Company was located on the outskirts of Pittsburgh, Pennsylvania. My first meeting with these two gentlemen was during one of those three years. The Braddock Wire Company, the

892 St. Louis Wire Mill Company, the Lambert & Bishop Wire Company of Joliet, and the Iowa Barbed Wire Company were consolidated, made into the Consolidated Steel & Wire Company of Illinois. These gentlemen, Coles and Stone, continued with the Consolidated Steel & Wire Company of Illinois. My position in that company was president. I was always in general charge of all labor, machinery and plants in general; in other words, I was of the aggregation of men the mechanic. Stone and Coles remained in the same
893 position, the Purchasing and Sales Agents in the Consolidated Steel & Wire Company of Illinois after it was absorbed with the Braddock Barbed Wire Company and those other companies, both of them transacted their business from the office in Pittsburgh. Both of them had to travel some during these years; I saw them frequently. As the mechanic, so to speak, of the enterprise, my business brought me in frequent and close contact with Stone and Coles. I cannot distinctly remember the year when I came into supervision of the mechanical or construction department of
894 the Iowa Barbed Wire Company. It was in the middle of the 90's or early in the 90's, when the Iowa Barbed Wire Company was taken in along with the Braddock Wire Company into the Consolidated Steel & Wire Company of Illinois. I then met Cluff and Alder. They were connected with the Iowa Barbed Wire Company. Mr. Alder was in charge of books and costs of production. Mr. Cluff was found in the New York office, I think he was Secretary and in charge of sales. The Braddock Wire Company, with which Coles and Stone were connected, and the Iowa Barbed Wire Company, with which Alder

and Cluff were connected, came into the Consolidated Steel & Wire Company of Illinois, of which I was president, at the same time. And from that time on I knew Cluff and Alder. I was brought in frequent and close contact with them. That is, with Alder mostly. That was about 1892 or 1893.

From the incorporation of the Consolidated Steel & Wire Company on, the Consolidated Steel & Wire Company of Illinois and a number of other companies were also merged later on into the American Steel & Wire Company of Illinois in 1898. That American Steel & Wire Company of 896
Illinois not only took over the Consolidated Steel & Wire Company of Illinois but a number of other companies.

I said that the American Steel & Wire Company of Illinois was organized in 1898, and took over the Consolidated Steel & Wire Company of Illinois and other companies. Mr. Alder, Stone and Cole continued with the American Steel & Wire Company of Illinois in some capacity. Mr. Gates sent another man with Cluff with whom Cluff could not get along, and so Cluff resigned. He went with the Illinois Steel Company very shortly after. The Illinois Steel Company was 897
separate from the American Steel & Wire Company of Illinois. Mr. Cluff took the position of salesman in the Illinois Steel Company. I believe his headquarters was made in New York at once. I am not sure, he may have been awhile first in Chicago.

Alder remained with the Iowa plant. Coles remained with the Pittsburgh plants. He was put in charge of all the mills, as head salesman. Stone remained as general purchasing agent for the whole company. Coles was in charge of all the Pittsburg district, as we call it.

898 Stone was in charge of all the Company's purchasing department; after the organization of the American Steel & Wire Company of Illinois in 1898 there was a subsequent and a larger organization later on. That was the American Steel & Wire Company of New Jersey. I was on the Executive Committee and First Vice-President of it; I wanted to retire; and that was organized in 1899, I think. It took in practically the balance of the companies in the United States, except Roeblings and a few others. It did not take in
899 the Illinois Steel Company. Cluff continued with the Illinois Steel Company. The American Steel & Wire Company of New Jersey comprised nearly all the steel and wire companies of this country. It remained as the final organization, but the total stock being sold to the United States Steel Corporation, it became subsidiary to them, but remained as a separate corporation just the same. On the organization of the United States Steel Corporation in 1901 it took over the American Steel & Wire Company's stock, and also the stock of the Illinois Steel Company, and of the Minnesota Iron Company.

900 They had been grouped into the Federal Steel Company perhaps a little before that; the Federal Steel Company was also taken over, so that all the wire business was merged when that was done. I became a Director and a member of the Executive Committee of the Steel Company; that brought me to New York. I came to New York in 1901, I think. It may have been early in 1902. I had occasion to send for Mr. Stone before coming to New York, and while my office was in the Rookery Building; that was at the time when I was requested to come to New

York by Judge Gary. Stone was still in the same position he had occupied; he is there yet. Cluff, Alder, Coles and Stone, through these successive organizations which I have described, followed the wire business into the United States Steel Corporation and continued with it; except as to Cluff; he followed it in through the Illinois Steel Company, so that when the Illinois Steel Company and the other companies did become part of the United States Steel Company they all found themselves as subsidiary companies of the United States Steel Corporation. 901 902

Mr. Alder came to New York, Mr. Coles came to New York, Mr. Stone was moved from Chicago to Cleveland, and Mr. Cluff was already here as salesman of the Illinois Steel Company, or a subsidiary company. For a little we took up our offices in the Bank of America, until the Empire Building was completed. We moved then to 71 Broadway where the whole administrative machinery of the Company was concentrated. Cluff was in that building, and Mr. Coles was in that building; Stone was not. Alder I am not sure of, but he was with the Company. I had something to do with the organization of the Consolidated 903 Steel & Wire Company of Illinois and with the taking in of these four other companies with it. We took in these other companies. As to whether Mr. Coles and Mr. Stone had any business relations with me at the time of the organization of the Consolidated Steel & Wire Company of Illinois, I was President, and they were in the Company. They were stockholders in the Consolidated Steel & Wire Company of Illinois. They at times asked me about the stock, and they became the purchasers of stock of the Consolidated Steel &

Wire Company of Illinois. Later on, in the organization of the American Steel & Wire Company of Illinois, I had business relations with these gentlemen looking towards their taking some of the stock of the American Steel & Wire Company of Illinois. They, as well as the balance of the stockholders, myself and them, subscribed to the stock in the new Company. We all subscribed to that new Company. Those that had extra money would take the balance of what was not covered, as far as the stock would go. Sometimes it would
905 be one of us and sometimes another, but whatever was done every stockholder in meeting ratified it. When the American Steel & Wire Company of Illinois was consolidated it took in the Consolidated Steel & Wire Company of Illinois and other Companies. Stone and Alder and Coles were stockholders in the Consolidated Steel & Wire Company of Illinois and I was. We all turned our stock in to the American Steel & Wire Company of Illinois, and got stock in return of the American Steel & Wire Company of Illinois making the exchange. That was the way the subscriptions were paid. That was done every time in all these
906 successive organizations when the American Steel & Wire Company of New Jersey was organized, the stock of the American Steel & Wire Company of Illinois was exchanged for stock in the American Steel & Wire Company of New Jersey, and the subscribers paid their subscriptions by turning in their stock. Coles, Stone and Alder did that. I do not know about Cluff; you see he was with the Illinois Steel Company. When in the final windup, when the United States Steel Corporation took over all of the Wire Companies, the stock which I owned in these various Wire

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Companies was exchanged for the stock of the United States Steel Corporation, we turned in the stock of the Wire Company to the Steel Corporation, which gave us in payment for that Steel Corporation stock.

We did not subscribe under the Steel Corporation, we did previously. I understand that Cluff Alder, Coles and Stone got their stock in the United States Steel Corporation by the exchange of their wire stock for it. I cannot swear to it. When the Steel Corporation was organized in 1901 and the whole matter was consolidated, when 908
the administrative machinery was consolidated in New York, I made my headquarters thereafter in New York. After my coming to New York, Alder, Cluff, Coles and Stone and I met quite frequently in the hallways and elevators, or something like that. I had my office on the ninth floor in the Rookery Building, in Chicago, before I came to New York. After I had parted with all my interest in the wire business and became a stockholder in the United States Steel Corporation, I went on the Executive Committee of the United States Steel Corporation as Director. I think the Executive Committee went out of existence in 909
about one year. That ended my connection with the Steel Corporation except as Director. The United States Iron Company was incorporated, I think, in 1899, maybe 1898, I do not know. It was before I had finally gone into the Steel Corporation, while I was in Chicago. J. W. Gates, John Lambert, I. L. Ellwood and myself incorporated the United States Iron Company. At the time of its incorporation there was property which was designed to be turned over to it.

910 I think it was all bought afterwards. Mr. Gates was the man who handled it, I did not do anything but pay for my subscription, I was not active in the handling of it. The United States Iron Company was organized for one million capital, with these gentlemen you have named. I think I first took something like $250,000 in that company. Of course the record will show that better than my memory. I remained Second Vice-President of it. The offices of the United States Iron Company were in the Rookery Building. Mr.
911 Gates had them on the eighth floor alongside of the Wire Company offices. "The United States Iron Company" was on the glass door. J. W. Gates' name was also on the door. That was in 1898 or 1899, I am not quite sure between the years. After its organization the United States Iron Company acquired ore properties in Tennessee and in Alabama. I got the names of those from whom these properties were bought, but I hardly could—it is so long ago I do not know the names. It is all on the books. W. R. Dickman, of Dickman & Mackenzie, examined and reported
912 upon the property which the United States Iron Company bought. They are located in the Rookery Building in Chicago. They are geologists, their card says, geologists, chemists and mining experts. Before it was bought I saw a good deal of the property; I do not know that I saw it all. I am talking about the properties that were bought by the United States Iron Company originally. The property that I saw consisted generally of land with test pits dug down into it disclosing ore, and Mr. Dickman and other experts figured out, analyzed and reported the apparent

volume of the ore in that property, a farm of 160 acres might have only 20 acres of ore on it, but you had to buy the farm. I do not now remember the general acreage of the property, there were thousands of acres, but I do not remember the number now. In one instance there were improvements on the property; we bought from McLanahan, we bought his land, and he had already in a small way operated a little mining plant on it. After the purchase of this property on the report of Dickman, Mr. Gates engaged this man McLanahan, whose property he had bought and who had already mined ore down there, to open up mines. Mining machinery was ordered and installed, pumps and the like of that, railroad locomotives were bought, rails laid, and also a full gauge railroad was put through the property to connect the mines with the L. & N. Railway, so that that ore could be sent to market.

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Later on the property was put in operation and ore mined from it. Before the Company bought it, Mr. Walker, W. R. Walker, had first made a trip through Alabama and Tennessee to investigate available ore properties, and upon his report Mr. Dickman then was sent down to go into the merits of the separate pieces of which we had heard, which we had selected. During 1900 and 1901 the pipe lines were laid and the pumping stations installed and the washers that wash the clay out of the ore were constructed, and the railroad constructed, and some mining done in 1901. It did not continue to increase in mining production. Not much was particularly done in the mining of ore there before the United States Iron Company became the Sheffield Company, only that one year there was some ore mined.

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922 on both floors. The interview I had with him was in the office of the United States Iron Company on the third floor. It was that office that had on it, the United States Iron Company, William Edenborn, President.

The disposition of this furniture took from the beginning of the transaction to the end of it, a month or six weeks, maybe. He wrote me a letter about it. He just informed me that he had sold so and so much, or he could get such a price for it.

That letter, Plaintiffs' Exhibit 54, refers to the
923 sale of this property by Mr. Stone.

There was nothing more to do with the furniture or anything else. I knew Mr. Sim by sight, but I had not known him closely. Mr. Sim in fact had been known to me, that is to say by sight, but we never somehow just got into actual contact, you know, until the subscription matter came up. I never talked with him or had any interview with him. I know his former employer. His name was Mr. Forbes Leith. Known as Lord Leith. He has been made Lord Leith now. He was with Forbes Leith as long as I knew of him. I had only known him by sight perhaps a year.
924 Before this subscription, somebody pointed him out as Mr. Sim. Mr. Forbes Leith was a gentleman of large means, and was very heavily interested in the Minnesota Iron Company and in the Illinois Steel Company, one of the heavy stockholders.

After the Steel Company was incorporated, and perhaps before, there was an order or system by which the paper known as "The Iron Age" was furnished or sent to each of the men employed. The Company made every year an order for a copy of "The Iron Age" for all the

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heads of the different departments. That included the Purchasing and Sales Department. That would include the departments of which Coles and Stone were heads. They were all heads of departments.

Cluff was with the Illinois Steel, but after it became the United States Steel Corporation; they always had it in their office. The Steel Corporation continued sending this "Iron Age" the same as the Wire Company did. "The Iron Age" is a publication which comes out every week, dealing with the steel and iron industry; it is a big authority on the question.

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The paper of date September 18th, 1902, shown me is "The Iron Age" to which I refer. I have seen that copy. I saw the article on page 36 which is marked in pencil, some time ago. I had nothing to do with the preparation of it.

MR. LITTLETON: I ask to have this marked for identification.

The article was marked Defendant's Exhibit No. 1 for identification, October 25th, 1911, C. B.

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No active work was done in mining on the property of the United States Iron Company after my coming to New York and before the organization of the Sheffield Company the Iron Company continued to have its office in the Empire Building, until it was turned over to the Sheffield Company. The work of beginning the organization of the Blast Furnace Syndicate began April 15th, 1902. I am familiar with the Syndicate Agreement which has been marked in evidence and referred to. I drafted the Syndicate Agreement, it is not my composition it is a

copy of another one where I had been a syndicate manager with Judge Gary, in a coal property, the Pocahontas. In that Pocahontas district it was located. This Syndicate Agreement here was copied by me from the other. I had my stenographer copy it. Made it to suit, instead of coal it said iron ore, you know. At that time when the Syndicate Agreement was made or prepared, the exact status of the physical property of the United States Iron Company, was that it had been opened up, there was a super-
929 intendent in charge, there was stock that was taken care of, but no especial work going on just then. The Company had outstanding I think $925,000. in stock and no bonds. There was no indebtedness only just a current feed bill and things of that kind for stock. Before the drafting or making up of the Syndicate Agreement the Steel Corporation investigated the property on behalf of the Steel Corporation. Mr. Gayley, E. C. Converse, and W. R. Walker, made the investigation and there may have been others, they did not tell me all. They did not make their investigation in connection with the Blast Furnace
930 Syndicate. I had before the Blast Furnace Syndicate was started—I had gone to Judge Gary, and I said, "Judge, I have got this iron ore property down there; now, I do not know how it would look if I were to go to work and get blast furnaces built down there, being in my position with the Steel Company, you know." And I say, "If the Steel Company wants to get a footing down in the southern ore fields, why, they can buy this property." He says, "Well, what do you ask for it?" And I told him that I would take preferred and common stock, both of them together,

I figured something in excess of a million dollars, maybe a million and a quarter, and they then took the expert reports of Dickman and others; and Mr. Gayley, he was in charge for the Steel Corporation over all their ore properties, he afterwards reported—he so told me—that this iron ore was especially fit for foundry iron, but not so good for steel making, and that the Steel Corporation was not in the business of making foundry iron, they only made steel; therefore, the property was not suitable for them. My first discussion with Judge Gary in regard to the matter was on account of the position I occupied with the Steel Company? And my reluctance to go into an independent concern without letting them know about it. I did not know as it looked right. Mr. Gayley had made this report to me before I drew the Blast Furnace Syndicate Agreement. I did not have any further investigation or report made upon the property after Mr. Gayley and Mr. Walker and the Steel Company had been over it.

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Mr. W. R. Walker and Mr. J. C. Walker, two brothers, both of them experts, Mr. W. R. Walker, assistant to the President of the Steel Corporation from its inception and still is, after he had known of this property before, and after he had heard from Gayley, who was looked upon as the best blast furnace man in the United States, that this ore was especially fit for foundry iron, he said, "Mr. Edenborn, let us all get together and put up furnaces down there;" he says, "My brother and me will put in $250,000, in it." He says, "If you can put up a couple of top mills down there and shove in the ore down there we will make the dollars." A top mill is where you put the ore in the top. He meant to indicate that

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we would grind out dollars. At that time iron was selling at $17. in the market, as "The Iron Age" will show. The price of iron was $17., and the cost of producing it was $7. I mean iron in the raw state was $17. a ton. I knew the cost of producing it in that territory. Only from what other people had shown me from what they had done. It is this way, a bunch of iron ore is here in Tennessee, and here is Sheffield, and here is Alabama, and there is another bunch of iron ore there, and they were assembled at the furnaces on the Tennessee
935 River. It takes a great deal of water. I mean that the total cost of producing foundry iron, from the mining to the foundry state of iron, would be $7. a ton. That was the basis of the report to produce iron at $7. a ton. Blast furnaces had to be built. The proposition was to build two blast furnaces. The two together were estimated to cost a million dollars. That is about the cost of building blast furnaces. These two finally cost a great deal more. There was something else to be put into the improvement and development of the property besides the two blast furnaces.
936 You need coke for smelting the ore, so we had to secure a coal property and put up coke ovens. Being informed that the Alabama coke was not a first-class coke, but that the Pocahontas coal field up in Virginia was producing a very good coke, negotiations were started, experts were sent out to see where they could locate a good coal property, and a coal property in Virginia was bought to make coke and ship it to the furnaces. We had to buy new sites, new land, for the blast furnaces too and on that build our blast furnaces. Then we had to buy this coke or coal property in Virginia. The coal property in Virginia is partly

owned by the Company, and part of it is under a lease, on payment of royalty for the coal mined from it, and the building of the ovens I think has totaled in the neighborhood of three-quarters of a million, or something like that. I mean the building of such property as we did build, and the building of the coke ovens, and the purchase of a piece of railroad has amounted to about three-quarters of a million dollars. There was a railroad from the coal mine almost finished. We had to pay for the finishing of that. The coal item comprised the purchase of coal property, the purchase and completion of this railroad to the L. & N. road and the building of the coke ovens. And I think that item amounted to about three-quarters of a million. This coal property and coke ovens were I think 560 miles from the iron mines, an ungodly distance, it was a wrong location. That was practically all, there was to be added to the original property of the United States Iron Company besides the two blast furnace sites and the blast furnaces, and the coal and coke property, and the railroad connection to the L. & N. Roundly the thing figured a million dollars for the two blast furnaces, and three-quarters of a million for the coal equipment, the coal property. I used the reports of Gayley and Walker on these items which were to be added to the original property of the United States Iron Company, before the subscriptions to the Blast Furnace Syndicate. The blast furnaces and the sites on which they are located, including a change in the blast furnaces themselves, which were wrongly built, wrongly constructed, has cost close to a million, three hundred and eighty or four hundred thousand dollars.

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940 The reference in the syndicate agreement to a valuable coal property situated on the borderline between the States of Kentucky and Virginia," is not the coal property to which I refer that was bought; that first property that they then had in mind to get, we had the fuel expert of the Illinois Steel Company to look for it, and J. C. Walker, but that fell through; but they found another one in the neighborhood which was bought.

The reference to the erection of two modern blast furnaces for the production of foundry and
941 other irons, are the two blast furnaces to which I refer. It cost considerably more than the sum of two hundred and fifty thousand dollars to purchase coal lands and to erect 200 coke ovens—— Two million five hundred thousand dollars was the sum estimated to be necessary to set this machinery all going. And that was based upon these reports I speak of. I had to go by the report of Gayley and Walker; I was a wire man, I was not a blast furnace man. This is the original syndicate agreement which you show me. Of course, there are several originals. I signed it first "William Edenborn, 71 Broadway,
942 N. Y. City." "500,000," and then that is erased and "475,000" is written above it. That is because Mr. W. R. Walker asked me to let him have $25,000 out of my $500,000 subscription. Well, he hung on to me so long—at first he asked me in fact for more, but I told him that was the limit that I could possibly let him have, I did not want to cut my own down, but I did let him have $25,000. I paid for it just the same myself. The next subscriber is W. R. Walker; his subscription was first $165,000, I think, and he finally had to come down to $145,000. It is $140,000 from $160,-

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000, or from $165,000, I think it was. I guess I had known W. R. Walker ten years. The Wire Company had him for years as an expert to look over the iron ore resources of Utah and of other places. He had been a blast furnace man for years and an iron ore man. He had not been a wire man, never was. August Mann, of Braddock, Pennsylvania, was a subscriber for a hundred thousand dollars of this stock. He was a wire manufacturer. The next is James Gayley, New York, for $100,000. That is the James Gayley who was First Vice-President. I had heard of

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James Galey but never met him, at the formation of the Steel Corporation. He was a blast furnace and ore man, he was in charge of all the ore business of the Steel Corporation. Alfred Clifford was in business with me in St. Louis. Isaac L. Ellwood, of De Kalb, Illinois, subscribed for $300,000. He was one of the original owners of the Iron Company stock. Ellwood's business was capitalist; I guess that is about the only way. He was in the wire business for years and years with us. The next names are F. Baackes, E. B. Lott, D. M. Merriman, F. L. Watson, C. L. Miller, Wallace H. Rowe; these men are all wire men. And

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by that I mean associated with the Wire Companies. After I drafted or copied this Syndicate Agreement and signed it myself, I should judge that ninety per cent. of it was subscribed in my office. As to whether I consulted with anybody about the syndicate agreement or after I had drawn it submitted it to anybody, I have gone with Mr. Walker to Mr. Gayley's office when Walker told me Mr. Gayley wanted to subscribe to it. But usually it laid in my office, and it remained there. Mr. Gayley subscribed

946 to it in his own office. Mr. Walker subscribed in my office. I said that Gayley and Walker and Converse had examined the reports on the property at the time I offered it to the Steel Company. I think Mr. Converse subscribed in my office. His office and mine were side by side. He subscribed for $100,000. Mr. W. R. Walker knew of my connection with the United States Iron Company. August Mann knew about it. I had talked with him about it. Mr. Gayley knew that I was a large stockholder in the United States Iron
947 Company. I talked with him about it. I must qualify that. Gayley found out the principal part of it by the examination for the Steel Corporation when I first talked to him about it. Mr. Converse knew that I was a large owner of the United States Iron Company, by the same token, by the expert opinions and reports that were laid before the steel people. Mr. Clifford of St. Louis, who took $50,000, knew of my ownership in this Company. He had known it for years, from the very first inception of it. W. M. Douglass of Allentown, Pennsylvania, subscribed for $50,000; he was talking with me about it, the man coming and
948 talking to me about that United States Iron Company. I do not know that I stated in each instance, I am the owner of so many shares; but people knew it, like you know law. Thomas Dolan of Philadelphia subscribed $250,000. I knew Mr. Dolan; he had been with us for years in the Wire Company. I mean he had been a stockholder. I talked with Mr. Dolan about my ownership in the Iron Company. Alfred Douglass and W. N. Douglass are cousins. Alfred Douglass took $40,000 worth of stock; he knew about my ownership in the United States Iron Company. Leslie D.

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Ward of Newark, New Jersey, took $50,000 worth. I knew Mr. Ward. I talked with him about my ownership in the Iron Company; he was with the Wire Company for years. A. Heckscher, New York, subscribed for $50,000. I saw Heckscher on the reorganization committee of the Kansas City Southern road. I was on the same committee with him, and we traveled from Kansas City down to the Gulf several times together, and we sat in the car and talked about the ore resources and so on. I told him about my ownership in the United States Iron Company.

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When this Blast Furnace Syndicate was fully subscribed the Iron Company was turned over to the Syndicate Managers at once for the purpose of starting operations. The way that was accomplished was the taking of the stock of the Iron Company and turning it over to the Syndicate Managers. I was Chairman and August Mann, and J. C. Walker were the other Syndicate Managers. I turned over my stock to the Syndicate Managers. All I had, all I got from Ellwood, and all I got from the Mississippi Valley Trust Company. The stock of the Iron Company was owned by me, by Ellwood and by the Mississippi Valley Trust Company and that was all turned in to the Syndicate Managers and then the subscriptions on the Syndicate Agreement were called from time to time. They were all paid finally. The stock of the Iron Company was turned in to the Syndicate Managers at $70. a share. That figure was arrived at by figuring out my own and the other people's actual investment, and adding six per cent. interest to that for the time we had carried it, deducting five per cent. that was paid as a dividend. That calculating was done for me

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952 by J. C. Cole; I am not a bookkeeper myself. Mr. Cole was Secretary to the Syndicate Managers. I figured out the cost of the United States Iron Company stock to me. The actual cost as I understand it. Before the final organization of the Sheffield Iron Company, Mr. Gayley and Mr. Walker entered into negotiations for the purchase of a furnace site, and there was an available site which they concluded was the best obtainable, it was owned by the Tennessee Coal & Iron Company. There had been three old little blast fur-
953 naces on that property, and the idea was to get hold of that, put the mines in operation, and to proceed with the rebuilding, or tearing down of two of the furnaces and building two new ones in their place. This property that was to be gotten from the Tennessee Coal & Iron Company was in the shape of an incorporated Company. The name of it was Sheffield Coal, Iron & Steel Company—I think I have got the name right. It had outstanding stock and bonds. That is the way we bought the concern by their delivering all the stock and bonds to us. It was a subsidiary company of the Tennessee Coal & Iron Company. Owned by them
954 and they delivered to the Syndicate Managers all of the stock and bonds of the Sheffield Coal, Iron & Steel Company which owned these three blast furnaces on this site. I think they delivered $750,000. in stock and $750,000. in bonds so that we got complets ownership. The Sheffield Coal, Iron & Steel Company stock and bonds were bought the latter part of July or early in August 1902. That was paid for from the calls, from the moneys that were called on the subscriptions. It was paid from the subscriptions to the Blast Furnace Syndicate as the money came in it was paid

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on this. The books would show better how much was paid for the stock and bonds of the Sheffield Coal, Iron & Steel Company. My memory is that it was something like $500,000., it may have been $510,000. or $520,000.; it was in that neighborhood. After the stock of this Sheffield Coal, Iron & Steel Company had been bought we began at once to dismantle two of the furnaces, but iron at that time had gone up, from the time that we first conceived of the idea to go into this thing, from $17. until it was about $20.; and it looked as though there was a big profit to be made, so 956
instead of tearing down the whole three old furnaces we only tore down the two that were not wanted to rebuild, and left one little furnace standing. We mined ore and began operating with one furnace on September 2nd, 1902, as I remember, and operated the balance of that year. We operated this single furnace, a small one. That was the only furnace that was operated during that year. We bought coke for that in local mines. We had not gotten the Virginia Coal Company going. That was yet under construction. The price of iron did not continue about $20. for the balance of the year. In fact while we were going with that one 957
furnace it went up as high as twenty-three or twenty-four dollars a ton. I think that is right. Anyway, we sold some at $24. Operating that single furnace from September 2nd, we made at the rate, for the four months, of 12 per cent, on the $2,500,000. The mines we were mining then were the Smith mine, and what we called the West Point mine.

The memorandum shown me of date October 1st, 1906, will refresh my recollection with regard to prices. That memorandum contains the run of

958 prices from September, 1902, to November, 1903. I can hardly state these prices from memory. Iron went from $24 down until it finally reached $9, away below our producing cost. By reference to this memorandum I am able to state the actual prices, beginning September, 1902, and going down to November, 1903. It is taken from the books of the Company. In September the average contract price had been $17.25, the average price for October was $23.61; for November, $22.71.

959 No. 2 is the basis for all foundry iron sold. If you have No. 3, it is 50 cents less, and if you get higher than No. 2 you get 50 cents more. No. 2 foundry is the basis of sale. This highest price selling here is for No. 2, that is really a base price on the iron that is made; and those prices were for September, $17.25, for October, $24, for November, $24.75, and for December, $22. For January, 1903, the highest price was $20; February, 1903, $19.25; March, $19; April, $18.25; May, $17.50; June, $15.75; July, $14.75; August, $14; September, $12.25; October, $10.50; November, $9.25. That shows the decline in prices in No-

960 vember, 1903, when it got down to $9.25. We did not continue to mine it and sell it. I called a meeting of the principal stockholders and told them that they had put me in as a furnace man to look after the furnaces, while I was a wire man, that I could not produce iron as cheap as it was selling in the market, that they must find now somebody else, that I would not do it any more, that it took a man who knew all about blast furnaces to operate those furnaces, especially in view of the fact that the blast furnaces never did make iron as our experts had stated they would, namely,

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for $7 a ton, and also because the furnaces, instead of making 500 tons a day, did not make but two-thirds of that, they did not operate right. By that time in 1903 these were the new furnaces. You see that old furnace only operated for four months. From September until the end of December, 1902, we operated this old furnace singly. Up to November, 1903, we had gotten the new furnace going. Now, if I say from September to December we operated that old furnace only, it may be that we got one of the new furnaces in blast in January, and maybe not until February, 962
but the books would show that.

The old furnace was out, and we began as soon as the new furnaces were in operating shape to start them. In the meantime the Sheffield Coal & Iron Company had been formed by the Syndicate Managers, which was a change of name of the United States Iron Company.

We figured it out this way, here we were to operate it as economically as possible for our people, here was the United States Iron Company turned over to us, and the United States Iron Company had already paid $1,000 in taxes for incorporating in New Jersey, and we figured it out 963
that it would be better and cheaper for us than to use a brand new Company if we could save $1,000, so we changed the name of the United States Iron Company, changed some charter provisions, and changed certain things, and it became the Sheffield Coal & Iron Company. We also increased the capital of it to $2,500,000. I think there was a little time between when the incorporation had been made, from the time of the issue of the charter; the Syndicate was to run for a year, and the stock was issued on the 1st of

January. Finally, however, the stock of the United States Iron Company was exchanged in proper proportion, at the rate of 70, for the stock of the Sheffield Coal & Iron Company about the 1st of January. We figured it out how much that was at 70, what each one of the men who had stock in the United States Iron Company, their interest at par, and then we issued them whatever that came to in Sheffield Coal & Iron Company stock. I will have to figure over what that made my holdings in the Sheffield Coal &
965 Iron Company at that time; figured at 70 it was seven-tenths of five thousand and some odd shares. And so far as the subscribers who put in the new cash were concerned, they received their shares according to the subscription agreement. In addition to the stock which I put in as my subscription, I subscribed to some in cash. I guess the difference was something like $120,000; that I took for cash. I have not got the exact figures now. That was to make up the difference between my stock at 70 and my subscription of $475,000. Whatever that difference was I paid in cash. Everybody has paid everything that was
966 subscribed for in full.

I was made president of the Sheffield Coal & Iron Company. I am not really sure who was Treasurer; it may have been myself and it may have been Mr. Cole.

When I told my associates or the men interested in 1903, I was not a blast furnace man and they would have to get a blast furnace man, the meeting instructed Mr. Galey and Mr. Walker to find a thoroughly capable man to take that position, and they later reported that they found a man that they thought would be an excellent man

967

for the place. His name was Leonard Peckitt and I resigned. Mr. Peckitt was elected President, I think, in 1904; I do not know the month.

I told them so often I wanted to get out, but I had to wait until Mr. Galey and Mr. Walker could find a new man, I could not just leave the Company, you understand; I held on. We had operated up to the time that I resigned, but from the time I resigned until they found another man there was a period during which there was nothing done, I think it was the year 1904, the whole year, that nothing was done, because Mr. Peckitt 968
then wanted to make improvements, after we found him some additional money, and rebuild some things. The Company found itself in need of money at that time. Some money was raised. We looked over the situation, and the quickest way for relief seemed to be that the $750,000 of bonds that we had gotten with the purchase of the property from the Tennessee Coal & Iron Company was available, and we requested the subscribers for the Sheffield Coal & Iron Company to try and subscribe pro rata for these bonds for the stock that they had. I subscribed, I do not know the exact amount at the minute, but I sub- 969
scribed pretty heavy. Mr. E. C. Converse subscribed, and there was in a short while about $300,000 subscribed, and it looked as though the balance of the people would take the balance of it all right, but there was a stock market depression here, stocks were going down and everybody felt blue, and people stopped taking anything, and so there was only a total, if I remember correctly, of 323 bonds sold; they were sold at 90. Those were the bonds of the old Sheffield Coal, Iron & Steel Company. With this money

970 for which these bonds were sold some debts were paid. Mr. Peckitt repaired furnaces and started in to operate as soon as he could get things rebuilt and straightened out.

The price of iron at that time was pretty low. I do not know the price now. There is a printed list from "The Iron Age" I would rather get. I came out of the Company altogether. Peckitt and I did not pull together, he wanted his own way without any interference, so I agreed in a stockholders' meeting to let him have his own way if
971 he could make the thing go. Mr. Peckitt operated and made a very bad break in selling.

Mr. Peckitt, when he had one furnace in blast and had one good month where he had an output of 7,000 tons, and the second furnace in shape to be in operation in say about three or four weeks, he decided he would take his family and take a trip to Europe. Well, the Company had a contract with Rogers, Brown & Company here to sell all the output of the furnaces on a two and a half per cent. commission. Now, Mr. Peckitt told Rogers, Brown & Company to sell during his absence 14,000 tons a month, at the market price,
972 whatever they would obtain. The market prices at that time were somewhere between $12 and $14.

By wanting the second furnace in blast he had made additional purchases of coke and ore; the capacity of the Company up to that time having been to supply one furnace, but he was now going to put the second furnace in. He bought some ore and some coke, just the amount I do not know, because I was inactive. The reprint from "The Iron Age" entitled "Fluctuations in the prices of iron and steel products, 1897-1905," shown me, I have seen before and gone over it. I know this

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to be a correct statement of the iron prices at that time.

MR. LITTLETON: I offer this in evidence.

The paper was admitted in evidence and marked Defendant's Exhibit No. 2, October 25th, 1911, C. B.

I made payment on subscriptions of stock for others in this Blast Furnace Syndicate as well as my own. The memorandum shown me is a correct statement of what I paid for others as well as what I paid for my own, in cash.

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On December 31st, 1902, I issued my check on the Chase National Bank to myself as Chairman in payment of the following subscriptions:

W. R. Walker	$ 6,250.00
A. E. Harper	2,500.00
C. K. Winslow	1,250.00
C. A. Vogt	1,250.00
J. E. Cole	875.00
F. E. Patterson	1,500.00
P. McIllvried	2,500.00
T. P. Alder	8,500.00
Personal	46,200.00

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making a total of $70,825. in cash in those items. These gentlemen, on whose account I made these payments, as a whole, practically in turn paid me, some of them have not. That is a personal matter between them and me. I was paying for them or on their account. The balance of the paper shows that on December 31st, I issued my check in favor of the Chase National Bank in favor of myself as Chairman, in payment of the subscriptions as follows:

976 William Edenborn.

Personal	$92,250.00
W. R. Walker	3,750.00
A. E. Harper	1,500.00
C. K. Winslow	750.00
C. A. Vogt	750.00
J. E. Cole	525.00
T. P. Adler	1,500.00

making a total of $101,025. I gave those two checks.

It appears that my chief clerk always figured
977 the calls that were made, you understand, from time to time, and he made the two checks so as to cover the separate calls.

It appears from this, that I paid in cash for my calls, on my own account, the sum of $46,200. and $92,250., which would be $138,450. That is the amount of cash, in addition to my stock, which I paid in.

MR. LITTLETON.—I offer this memorandum in evidence.

The paper was admitted in evidence and marked Defendant's Exhibit No. 3, October 25th, 1911, C. B.

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I do not think I attended the stockholders' meeting that was held at the time or prior to the election of Mr. Peckitt. We had a stockholders' meeting before his election at the Company's office. The annual stockholders' meetings were held in New Jersey. I was elected President of the Company in about December, 1902, or January, 1903. I do not remember the date any more when we held our annual stockholders' meeting. I will have to look that up, I do not have it in mind. I was present at the meeting following the

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meeting where I was elected President, the annual meeting. I think Sim was present. There are records of that that would show it more in detail. I am convinced now that Mr. Sim was present. I do not think that the others were present except by proxy. After I had resigned and Mr. Peckitt had become President and had operated he made a contract with Rogers, Brown & Company for the sale of the iron. It was what we call sliding scale contracts.

As the price of the foundry iron went up, why, the price of the ore increased above that fixed sum. In case the foundry iron had gone down below what it was at the period when the contract was made the price of iron would also decrease.

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It increased during that period, well, it was averaging from $12.50 to $14. at first, I understand, and it went up from $17. to $18.; but having sold from $12.50 to $14. of course all the deliveries had to be made on that basis; and unfortunately Mr. Peckitt had figured on the output of two furnaces, and one of them went wrong on him, he had only the output of one furnace for most of the time, and therefore the deliveries had to be made at these low prices extending over a tremendously long period, while for the ore and the coke bought the prices went soaring on account of the high prices for iron.

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Supposing the iron that was sold in the market was $14. a ton, and it went up say to $15. a ton, I have frequently known the increase in the ore price to be 10 cents per ton for every dollar, but I am not positive what it was in this case.

The sliding scale was for the purchase of ore and coke, and the fixed sum was on the contracts of sale of the iron. The crippling of one furnace made that contract extend over a long period of

982 time. Mr. Peckitt hung on with his management until the concern had gone by the board.

To THE REFEREE:

My prices for iron are fixed on actual sales and by the quotation of prices in "The Iron Age". Actual sales and the quotations from "The Iron Age" are pinned together here.

To MR. LITTLETON:

983 In this sliding scale I think the price of coke and ore is based on the quotations in "The Iron Age." I think it was early in 1908 when Mr. Peckitt's administration of the affairs came up abruptly for consideration and when I was about to stop work down there. We had gone through 1905, 1906 and 1907 operating this one furnace. In 1904 it was shut down for the rebuilding of the furnaces, and then Peckitt made these contracts in 1905 and 1906 and 1907, and then the thing was so heavily in debt that he could not hold it up no more and so he resigned. That statement you have is an exhibit of cost, analysis and market
984 price of ore mined from United States Iron Company properties, September 1st, 1902, to December 30th, 1907, showing profit that would have resulted had ore been sold at market price. Those are the dates on which the ore mining began and ended; that is, September 1st, 1902, to December 30th, 1907. In a subsequent statement to that it shows it up to October, 1910. This statement was made up by that man that died, you know. That is as far as he had gotten with it. He had gone into all the details from the first day that the mines were in operation. That is the statement that I refer to at the bottom. That says 1909 and

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1910. That is complete. This brings it up to the end of the operation of the mine. This was prepared by the assistant treasurer, who had always been in charge of the mining operation books, at first at the mine. His name is W. M. Jones. He died the last time I was here to attend a meeting this month. I have been over this statement. I do not know anything about the correctness of it; not personally. Without comparing it with the books I could not say. Mr. Jones' assistant could verify this statement. His name is Polk, I think. He will be here to- 985
morrow. I think it was in October, 1908, we had a meeting of the directors of the company when Mr. Peckitt had carried the thing as far as it would go. There was a bond issue made by the Sheffield Coal & Iron Company. I think it was 1908. There was a reorganization committee of the Sheffield Coal & Iron Company appointed. I was not a member of that, and as a result of their deliberations there was a rearrangement of bonds and stocks. I paid $109,999, for which I got one-half bonds and one-half preferred stock; it would have been on that ratio. These were $1,000 bonds. As to whether I am in error about 987
that, and that they were $500 bonds instead of $1,000 bonds, I have mentioned the sum. It is correct that I took 3,830 $500 5 per cent first mortgage bonds, and then two $100 5 per cent first mortgage bonds; they were sent to me; making a total of $191,700 of bonds by me invested. I put up my money for that. There was not an issue of preferred stock in this reorganization. Out of that $109,000 that I paid the last time we only got bonds for half of it and the other half we got preferred stock. I know the

amount which I put in after the reorganization plan had been adopted. I know that amount, but in that amount would be included the first bonds that I took. I mean the first bonds of the old Sheffield Coal, Iron & Steel Company. I only got the total of the two.

I put in after the reorganization $109,000; nothing else in the way of bonds. We turned back all of the stock which we had and got new stock for it, part preferred and part common. This item here, 3,830 first mortgage bonds, $191,500, is
989 what they cost me. I know it figured out at that time $109,000. The first of them sold at less than 90. The others were sold at par, the last of them. I remember the first bonds of the Sheffield Coal, Iron & Steel Company, 323 bonds that were sold, and then the market went down and we could not sell any more, when we first needed the money. Of those bonds I took close to $100,000, but I do not know the exact figure. The 323 bonds were of the Sheffield Coal, Iron & Steel Company, and those I paid cash for at 90. In 1908, by the reorganization scheme, there came the issue of the first mortgage bonds of the Sheffield Coal & Iron
990 Company, and the retirement of the common stock which had first been issued, and the exchange of preferred stock for that, or the splitting up of the stock into preferred and common. I took 3,830 5 per cent. first mortgage bonds of that issue of 1908, and then later took two more bonds of $100 each. I do not know how that came about, those two bonds, I have not got that clear in my mind. Then I took 2,274 shares of the preferred stock under the reorganization, and 5,473 shares of the common stock; that is what I got. I turned back the stock which I originally got

991

in the Sheffield Coal, Iron & Steel Company. All of them turned back their old stock, under the reorganization plan. At least, so I understood; I believe they all have except these men in the case. That made my total investment in the concern, of bonds and stocks, $692,700. That item of $48,000 is where I had advanced the money to pay for people; they gave me the stock and their notes and never paid me. I have got the stock still in the same old shape. The $692,700, plus the amount of stock which I took on which I had made advances of $48,000, made a total of 992
my investments in the enterprise of about seven hundred and thirty something, I do not know about a few thousand by heart. If you call it seven hundred and thirty thousand you are easy within the limits, I know. Under the reorganization plan a new President was elected to succeed Mr. Peckitt, a man by the name of Rust, and a new Board of Directors was elected. Mr. Gayley, Mr. W. R. Walker, and Mr. Converse were on the Board. Since that time Mr. Rust operated the property for a time, but the market dropped too low. I have personal knowledge. I have been since Mr. Rust was President down 993
to the works and looked at them and seen them in operation. There was one blast furnace in operation then. I think that was in 1909. This was one of the blast furnaces that was built at the beginning, a rebuilt one. In all, two blast furnaces were built there. Mr. Rust is still President, as I understand it. He operated the one blast furnace until October or November, 1910. I understand that Mr. Galey and Mr. Walker are still Directors of the Company. Mr. Rust operated until October or November, 1910. Then they

994 closed the blast furnace, and they have not operated since that time. There has not been to my knowledge any active operation of the property since October, 1910. During the time that Mr. Rust operated he did get his coke from the Virginia mine, and he mined the ore out of these various mines of the Sheffield Coal & Iron Company. The cost of the transportation of the coal from the Virginia coal fields to the furnace is $1.75 a ton. The mines of other companies that are being operated near there get their coal there
995 nearby. The cost of transportation of their coal is somewhat varying from 12½ cents to 40 cents, perhaps 50 cents, a ton. I figured this high cost of transportation of the coal was a handicap of more than a dollar a ton, from one dollar to a dollar and a half a ton of iron produced, as against our neighbors. Mr. Rust bought coke nearby, and operated with that. I testified to that awhile ago. At times he bought coke. I have been down and seen the property once since 1910. I believe some few months ago I was there, but everything was done. I just only was in Sheffield, and the property was closed up.
996 There was a man in charge. Mr. Diekman would be able to state the ore tonnage, the ore reserve there.

My knowledge is all based on expert opinions. I don't know enough about the ore business to be able to tell how much has been taken out and how much is left except from the statements; I think there are two men who could be able to state fully as to the ore reserve there, the contents now; either of them could state it thoroughly. One is Mr. Dickman, the man who originally went into it, and drilled holes and estimated. The other is

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a man by the name of G. W. Worthington, who has perhaps been for thirty years a man in charge of ore mines for the Sloss, Sheffield people and who is acquainted with the whole country there and is acquainted with these mines. I expect Mr. Worthington tomorrow. I have stated substantially now, fairly so, the history of this organization from the beginning up to the present time. I said this morning that I knew Mr. Sim by sight for some little time, and that I met him at the time of this subscription; at first he was simply pointed out to me. And having seen him once, as 998
soon as I saw the man I knew him, that is about all. The circumstances under which I came to speak to him or know him were that he was introduced to me, I believe by Mr. Cluff, in my office, 71 Broadway. They came to my office. I do not know whether each one was in my office at the same time, as we had two offices, a double room. I know positively that I have seen Mr. Sim separately in that room. Maybe one was in the anteroom for awhile. At that time Mr. Cluff introduced him to me and said he had brought Mr. Sim along who would like to get into the ore scheme, the blast furnace scheme. That was I 999
think in May, 1902; I do not exactly know; it was during the time that this Blast Furnace Syndicate was being organized. Mr. Sim wanted to subscribe, and he asked could he have stock in this Syndicate. I told him he could. And he subscribed I think ten or fifteen thousand dollars. Now, he said, "Mr. Edenborn, I have heard about your ore properties, but" he says, "I do not want to rely too much upon others, I would like you to say whether that ore is high in phosphorus. What kind of ore is it? I simply says, "Mr. Sim, this

1000 is an ore pronounced especially fit for foundry purposes by Mr. Gayley." I did not have much other talk with the man at all.

He subscribed there in my office. I did not say anything to him as to having an option on iron ore properties. I did not say anything to him about having subscribed $500,000 myself, unless he saw it on the agreement. I did not say anything to him about everybody would come in on the same footing, and that every man's dollar would be up against every other man's dollar.

1001 Nothing else was said by me to him regarding this proposition than what I have already stated. No representation or statement, other than I have already stated, was made by me to Mr. Sim; he simply was very anxious to get underwriting. I did not tell him that the Company was a paying Company. I did not tell him at that time that I was going to get control of the United States Iron Company by the payment of cash. This letter, Plaintiff's Exhibit 6, to which you call my attention, which refers to obtaining an option on a property on which there are three blast furnaces which can be relined and improved was with ref-

1002 erence to the property that Mr. Gayley got from the Tennessee Coal & Iron Company; the blast furnace site of the old Sheffield Coal, Iron & Steel Company. This letter is signed by me and August Mann and J. C. Walker. The reference to the purchase of a coal property already opened and the holding of an option on such a property which has connected with it a railroad six miles in length, graded, ties laid, and rails are now being placed, all of which goes with the property, was to the Virginia coal property. We did have an option on that property at that time. I think

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Mr. McVeagh, our counsel, prepared this circular letter. I saw the letter and understood the facts. There was no reference made of any kind in that letter where it speaks of having an option on property to the property of the United States Iron Company. It referred to coal property. I do not think I was at this stockholders' meeting in 1906, referred to by Mr. Sim. I do not remember. I did not say to Mr. Sim at the time he subscribed, or at any time, that there were no "special advantages," using that phrase; I did not speak anything like that to Sim. I never asked Mr. Sim

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to subscribe to this Syndicate Agreement. I never solicited his subscription, directly or indirectly. I said I knew Mr. Alder and had known him for a number of years. Mr. Alder is a kind of an expert bookkeeper for export of stuff. Alder was with the American Steel & Wire Company. We started in with him at the Iowa Barbed Wire Company in 1892. He was then at Allentown, Pennsylvania. Mr. Alder was never located in Chicago while I was there. I do not remember whether he ever visited me or I ever saw him in Chicago. I guess he has been there, but I do not remember it.

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From 1892 on up to the time of this subscription to this Syndicate Agreement, generally speaking, Mr. Alder and I met perhaps once or twice or three times every week, here and there in the hallway and the elevator, you know. I mean after I came here to New York. Pardon me, I thought you said 1902. From 1892 I came to Allentown probably every month or six weeks in my travels around the mills, and I would see him then regularly. After I came to New York and were in the Empire Building he was located

1006 there with me. After my removal to New York, as I say, I met him occassionally, perhaps two or three times a week, in the hallways or in the elevators or somewhere downstairs. Sometimes I may not have seen him for a whole week, you know. I spoke to him, I remember, when I first had conversation with Mr. Alder regarding the Blast Furnace Syndicate. That was at 71 Broadway. He asked me, he says, "What is this talk about a Blast Furnace Syndicate? What are you folks doing?" I told him it was in the making
1007 yet, that Mr. Walker proposed it, that we were considering such a thing. That was probably in March or perhaps early in April, in the spring of 1902. Nothing further was said at this time. I think he has on one or two occasions asked, "Well, how are things going on with your Syndicate?" and expressed himself that he was sorry he didn't have no money, he would like to go in.

As to whether he had in prior times with me from 1892 up to the organization of the United States Steel Company, subscribed to the various wire companies that were organized, my recollection is that he went out of every company into
1008 the next one with whatever stockholdings he had. Now, sometimes he may have had his stocks sold, I cannot say it was every time, but everybody who had stock in the Company done that. I mean my recollection is that he passed from one company on to the next in subscriptions. When he said he was sorry he didn't have the money to get in there was not much to say; if he didn't have the money he could not get in. I did not have any further conversation with Mr. Alder until late in the year. He came to me and asked me whether he could still get into the Syndicate

scheme, somewheres about I guess November of the year. I think it was about November. I told him, why, no, the Syndicate was closed in July; it was oversubscribed in June, he was too late. He said he was sorry, but he had just now had a show of getting over $10,000, and he would like to get in again. I told him it was too late. Well, he came again to me, either a few days or a week later, and he says can't I help him to get in there, was there not someone that one could get stock from, so that he could get in. He said he had the money in sight, he didn't have the actual money yet, but if it could be done he would like to have me help him. And that was the time that I told him I had been up in the Waldorf and met Mr. Ellwood, and Mr. Ellwood told me he had bought a gold mine in Mexico, a big investment he was making, and that he would have to hustle for some cash to make his first payment, and so I said I would see if I could do anything with Ellwood for him; and the upshot of it was that I succeeded in getting Ellwood to reduce his subscription $50,000. There were others who wanted more stock, wanted a larger interest, outside of Alder. I got Mr. Ellwood to reduce his subscription to the extent of $50,000. I afterwards talked with Mr. Alder then. I told him that he could get $10,000. He says all right. He says for me to take care of it, that he was going to get the money very shortly. And a little later than that he sent me a letter stating that he would get it, I think a little after the 15th or 20th. He asked me to take care of his subscription until he could get the money. When I got Ellwood to relinquish $50,000 he says, "Well, now, I am a subscriber, William, your friends are going to

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1012 pay this thing, your friends don't want to be beholden for this." I says, "I will stand for that, I will guarantee that part." Ellwood said, "All right then." So I practically guaranteed $50,000 of Ellwood's subscription, and in that way $10,000 for Alder and $10,000 for August Mann. It seems that Alder has paid me about the 15th or 20th of that month, but of course you all know business matters enough that my chief clerk, you know, he gets these things and he deposits them in the bank account, and I do not always pay at-
1013 tention to them. He paid me about the 15th or 20th of December, I think, and later on I got the $10,000 and he got his stock. I did not tell Mr. Alder in substance that there was a plan to acquire certain property for cash and form a company for the manufacture of pig iron. I told Alder that Walker and Gayley proposed, after we had the furnaces built, to smelt ore. I did not tell him anything about acquiring it for cash. I did not say that everyone would be paying cash and that everyone would have rights in proportion to their payments; there was no such thing as that talked at all with that man. That
1014 on account of it being a strictly cash proposition it would be a proposition that would be remunerative, and it was a thing he ought to take advantage of as it would be an opportunity of a lifetime. The man told me he had no money. I did not tell him anything like that. I did not tell him that there should be no advantages to anyone in connection with it, or that everyone would be on the same footing, not to Alder; or that I thought he really ought to have an opportunity of participating in such a business propositon, with only first-class properties that were good

paying things; or that everyone would be taken in and they would be taken only for cash, and that it would be a pity if he could not get some of it. I did not tell him anything like that. Now, as to pity—I would not use that expression; I did not. I did not tell him that if he had some of this stock he could put it away and forget that he had ever paid for it, and the income would be so large that it would be something he need never worry about and could forget about. I did not urge him a number of times to come into it. I did not finally tell him that Dr. Leslie Ward 1016
of Newark, by reason of his loss in other directions, could not make his final payments, and that he could get some of his subscription, and that was the last chance to get in. I told him that I would try Ellwood.

I did not ever ask him to subscribe to this. I never solicited his subscription. At the first talk the man said he could not come in, he had no money. Now, afterwards casually he said, "Well, are you folks progressing any?" But no further talk about the merits of the case. He came in in November or December when the thing had been six months going. It was over- 1017
subscribed in June and he came in in November. I had not after June solicited anybody to subscribe, or asked anybody to subscribe, how could I? There was nothing left. At that time there was a premium on his stock, when this man came in. About Dr. Leslie Ward, he has paid for every call that was ever made on him. He relinquished never a share. I qualify that by saying that I do not know what was done after the stock was issued; I do not know whether he has sold any shares since then; I mean at that

1018 time he paid for his subscription in full. I will try to explain the fact that Alder was charged with $136. interest, although his payment was not turned into the Syndiate until after he himself had made payment to me. Mr. Alder requested me to take care of him, to try to help him get $10,000. worth of stock. He did not have the money right then, but he had it in sight, he was going to get it. But the time, at that time, was just indefinite. But it was reasonably shortly. I say, "All right, Tom, if I can get anything from
1019 Ellwood I will do it." Now, to Ellwood I would have to guarantee that his subscription would be paid, when he relinquished the $50,000. So I considered myself a guarantor to Ellwood for that subscription. Now the calls as made by the Syndicate were made beginning in June, the first call in June, I think the 19th or 21st or something like that, and the second and third and fourth, etc. Now, all the balance of the people paid in their calls as they were made, excepting a few that I took care of that I have already stated. The owners of the United States Iron Company, seeing
1020 the chance that they could at once turn—owing to the market positions—turn the property to good account, you know it takes some time to do these things, to get to the furnaces and get that one furnace in operation, which made as I think $135,000. for that four months—these men then, Ellwood and myself and the Mississippi Valley Trust Company, at once relinquished their stock to the Syndicate Managers, and the Syndicate Managers accepted of it and put that property at once into producing something. By so doing the owners of the United States Iron Company stock paid all their calls and away ahead of their calls.

Now, you could not ask Alder, who comes in in December, to pay less than a dozen of the balance of the men on the same floor with him there, that would not have seemed right, and he at once admitted that he should pay interest at six per cent. from the end of each call on that money. I think in fact he figured the interest himself. And he pays that back with the $10,000., and brings the check or sends it to my office. Now, then, my man takes that whole account, owing to my guarantee to Ellwood, and puts it to my credit, deposits it in the bank. Now, it looked to me—Ellwood having done what I did, turned over his whole United States Iron Company stock right away at the beginning—and my man figuring that I by so doing had lost in interest—if I had insisted I could have had my money out of the first call that everybody was asking for, or out of the first and second calls, and paid myself for that property first; but we did not do that, we turned it over and made the payments easier on everybody that had to put up the money. If I had had to figure my own interest on what I had put in on the start, so my chief clerk tells me, I lost $3,300. I knew Ellwood was in the same boat as I was. So I thought if anybody was entitled to that $136. interest it was Ellwood, and under the belief that he was going to talk to me about it afterwards I made the payment for Alder of $10,000., in one check to the extent of $8,500. and in another check to the extent of $1,500., being the $10,000. Well, it appears that Ellwood has never said anything to me about that interest, and it has remained with me. I never knew anything about it myself though. I never knew anything about the item at all. I forgot all about it. If Ellwood had

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1024 come and talked about it I would have given him that money, I thought he should have had it. I don't hardly think I could be made a thief on that. My chief clerk made the calculation. I am not much of a scholar myself. I suppose I knew at the time that the interest had been figured at $136., and credited to me by being told by my clerk, I suppose, but that was so small a thing that I did not attend to the details, you know. The letter, Plaintiff's Exhibit 35, December 11th, 1902, I had from Mr. Alder and that was
1025 the understanding. Mr. Cole furnished him with these interest calculations. This letter Plaintiff's Exhibit 36, written to Mr. Alder on December 17th, acknowledging receipt of his check for $136.—was written by Mr. Cole. He attends to those things. That other letter written to Alder on December 17th acknowledging his check for $10,000. was also written by Mr. Cole. I think Mr. Alder paid his subscription about December 15th. I know when, in fact, I paid for him to the Syndicate Managers the amount of $10,000., which he had subscribed. That was on the 31st of December, we made the final payment. And that
1026 was along with other payments. That was the conclusion of the subscription to the Blast Furnace Syndicate. That was the end of it, and the money had to be turned over to the new Company. I did not know anything about this interest of $136. which Mr. Cole figured out, and this correspondence, until the Heckscher case was brought and I began to go over the correspondence. In fact I do not know that I knew of it until this case came up. Plaintiff's Exhibit 38, a letter of January 1st, 1903, written by me to Mr. Alder, in which I say, he is made a subscriber for

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$10,000., through the courtesy of Mr. I. L. Ellwood, was my letter to him. I have no recollection of ever writing him a letter, any other letter than that, in which I said in substance that Dr. Leslie Ward of Newark, by reason of a loss in other directions, could not make his final payments and that he could get some of his subscription, and that was the last chance to get in. It was true that it was by the courtesy of Mr. Ellwood he got Ellwood's $10,000 stock subscription.

Mr. Elmer E. Stone was one of the gentlemen who began with the Braddock Wire Company and 1028
was purchasing agent for that company. I would not say that I knew him personally quite as early as 1892. The Braddock Wire Company was incorporated in 1886 or 1887, and he was the first one, as near as I now remember, to ever be put in as purchasing agent for that Company, but what year that was and whether it was two, three or four years after the Company had started, now I could not tell that no more. But he was very early with the Braddock Wire Company, of which I was President. I understood that Mr. Stone is one of the men who, through the successive organization of steel wire companies became a sub- 1029
scriber to stock in successive companies in exchange. From the time I did know him, whatever date that was I met him every month once or twice, maybe, sometimes oftener. I mean before I came to New York. He had to travel some, and when he came to Chicago he came in to pay his respects, I was President of the Company. He was purchasing agent; he purchased all kinds of supplies. We were manufacturing, for instance, barbed wire and wire nails; now, it would never do to run out of the reels on which the wire was

rolled up, and it would never do to run out of empty kegs in which the nails were put. He had to attend to the purchase of oils and coal and all necessary things for a big iron works you know. Mr. Stone continued on in the successive companies which evolved from the Wire Company, until I came to New York. His offices after I came to New York, were in Chicago.

He was never in the Empire Building at all; he moved from Chicago to Cleveland later, but at that time he was in Chicago. He is the man who
1031 sold the United States Iron Company furniture for me which I spoke about this morning. He was in the office there in Chicago, repeatedly. Every time he came to New York I think he called on me. I never had any conversation at all with Mr. Stone regarding the Blast Furnace Syndicate not at the beginning.

I think I once talked with him about it, I think so. I think he once asked me—he had heard something about this thing, and was there anything being done. I told him it was not ripe yet, or something like that. That was in the Empire Building, or it may have been in Chicago, I am
1032 not very clear on the first time. I wrote him.

I wrote him a letter in New York on June 2nd, 1902, about some steel casting proposition that he had asked me about, and in that letter I spoke about this enterprise.

I had not written him before that at all. I had written to the man, but not on this subject, I mean.

In my letter dated New York, June 2nd, 1902, to Mr. E. E. Stone, Chicago—it is marked confidential—I say:

"Received yours of May 31st and wired you this morning to await my letter. I will

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now say that I do not care to express any opinion regarding the Steel Castings proposition, there seems to be dissatisfaction within their own ranks; meanwhile you have likely learned from Mr. Keefe, Merriman, Baackes or Watson that they have subscribed various sums to a syndicate agreement by which it is proposed to acquire certain ore properties in the South selected by Messrs. Walker and Dickman, the latter of Dickman & McKenzie, Rookery Building, Chicago. It is also proposed to acquire a 1034
coal property selected by Mr. Harper, fuel expert of the Illinois Steel Company, and to erect two blast furnaces, preferably on the Tennessee River in the neighborhood of Sheffield, Alabama. This proposition contemplates subscriptions to the amount of $2,000,000 or $2,500,000, as may be deemed necessary to purchase the properties named and to erect two modern blast furnaces. The ore properties are being purchased at cost to the present owners."

I remember that that was true.

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"And Mr. James Gayley, First Vice President of the United States Steel Corporation and Mr. W. R. Walker, two men probably better posted on economical productions of pig iron than any other men in the world, believe that they can manufacture foundry iron with two furnaces, such as they propose to have erected, to make foundry iron cheaper than is done up to date; certainly very much cheaper than is done by the ancient styles of furnaces in operation in the South. With conconsiderable safety margin they express

1036 themselves able to make such foundry iron at $6.50 per ton, while the furnaces in the South at present making such foundry iron, cannot supply the demand at prices ranging from $16.00 to $18.00 per ton, and it is believed that with two such furnaces we could make a considerable profit even at a time when other Southern furnaces had to sell at cost of production."

I recall writing him that letter. That was based
1037 upon my information from Gayley and Walker, and my knowledge of the market.

"We enclose herewith a list of subscribers, most of whom have voluntarily requested the privilege of subscribing."

That was true.

"When in Chicago lately I called at your office for the purpose of informing you of the scheme, but did not find you at home at the time. The proposition is purely a business matter; no bonds to be issued, nor any com-
1038 mon stock, nor any special advantages to accrue to anyone."

I wrote that.

What I meant was this, in changing these companies as shown heretofore and in taking in new companies, it was often that men interested with them would only come with their stock into the combination with us unless they were given certain specific offices. We fought shy of that, naturally, because many times the man was not fit for that really, but in order to get the new company out of the way as a competitor we very frequently had to submit to that.

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Another one was what we all knew in the wire company, that a man had gotten a salary at a certain rate under a five year contract, insisting that he as receiver or one of the receivers of the company, would only sell to our company that concern if he was given personally a contract for five years at a specific salary. That was another case.

The practice had been to issue a lot of common stock to promoters, which we did not propose to do in this company. Indeed I did have those in mind when I spoke of special advantages, and that is what I referred to.

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"It is to be a manufacturing investment and the profits are to be divided among the subscribers and stockholders in accordance with their holdings."

"The profits are expected to be considerable and it is proposed to have two furnaces built just as soon and as rapidly as practicable. From the tone of your letter I judge that you might avail yourself of the opportunity to subscribe toward just such a proposition; if so, will you please authorize Mr. T. B. Coles, or anyone else, not a Syndicate Manager, to subscribe for you. Should you desire such subscription we should hear from you as promptly as possible, as it looks as if the matter would be closed very shortly."

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That was June 2nd, 1902. I think by the 15th of June after that the whole blast furnace syndicate was fully subscribed. I had not prior to writing that letter had a conversation with Mr. Stone in regard to the blast furnace syndicate, that I recall. I do not recall that before that time I did. Mr. Stone was a very intimate friend with the

1042 superintendent of my works. I liked him for that reason. I had seen him throughout these years and Mr. Stone had repeatedly asked me, when ever anything turned up in the stock market that I thought was a good thing to let him know.

I say here:

> "Meanwhile you have likely learned from Mr. Keefe, Merriman, Baackes or Watson, that they have subscribed various sums to a syndicate agreement."

1043 Mr. Watson, Mr. Baackes and Mr. Merriman subscribed. Mr. Keefe told me he would, but he did not. At the time this letter was written he had told me that he would. These gentlemen were located in the Rookery Building, in the same building with Stone, and I wrote that letter I think from New York. Also Dickman, I referred to him. I also say that the property was selected by Messrs. Walker and Dickman, the latter of Dickman & McKenzie, Rookery Building. That building was the same building that Stone was in. I am positive he knew Dickman. Then I say in

1044 the next line:

> "It is also proposed to acquire a coal property selected by Mr. Harper, fuel expert of the Illinois Steel Company."

Mr. Harper was located in Chicago. Stone had never been with the Illinois Steel Company, but we had offices together, the Illinois Steel Company was also in the Rookery Building. I think I furnished him with the names of everybody that I knew that was connected with the examination of the property or who had subscribed that was there in Chicago. It is not true that Mr.

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Walker and Mr. Dickman had nothing whatever to do with the selection of the property that was bought. Walker and Dickman had selected it, I testified to that this morning. Mr. Dickman made written reports as to the property. Mr. Dickman stated that if those properties that he had selected for us were going into this blast furnace syndicate scheme he wanted all he could pay for. He did subscribe and paid his subscription. Mr. Dickman was a subscriber for $10,000 and paid it. Mr. Stone said in his testimony that Mr. Keefe was not a subscriber. Keefe did not subscribe.

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But at the time I wrote he said he was going to subscribe; he had told me that he wanted to get in. My letter has a statement in it, "The proposition is a purely business matter, and no bonds are to be issued or any common stock." I meant by that that the proposition was that we were to pay in two million and a half, and the experts all thought that that would cover what was necessary, that no bonds should be issued; about "common stock" I understand now that for instance where only one stock exists they call that all common stock, I meant that there would not be both preferred and common, that is what I had in mind.

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Of course we could not have a company without some stock in it. I say in here, "The ore properties are being purchased at cost to the present owners." I am referring in that to the men that owned the stock of the United States Iron Company. I was never asked anything by Mr. Stone as to what that reference meant. It was some time before this letter of June 2, 1902, was written that he had sold the furniture of the United States Iron Company for me. In reply to this letter, which I have been quoting from, and on

June 7th, Mr. Stone wrote me in substance that he was sorry that he was not in a position to take some of it. And on July 26th, he wrote me that he could now see his way clear to take $5,000 worth if it was not too late. At that time the blast furnace syndicate had been subscribed. You see W. R. Walker could not pay for quite as much as he had subscribed. He had been hoping that I was going to carry him for more than $25,000. I do not mean the $40,000 I got from Ellwood. The $40,000 I got from Ellwood was for Alder and
1049 August Mann. I told him I could not carry him for more than $25,000. So I was able then to let Mr. Stone have some more. Then on August 6th, 1902, he enclosed me New York Exchange for first installment payment. Everybody has paid his installment. On December 10th, 1902, Mr. Stone writes me as is shown by his letter:

> "At the time I subscribed for the blast fce stock I could not take any more as I could not pay for it. I would like to have $10,000 worth of this altogether if I could get it as I think is a very safe investment. If you
> 1050 care to let me have 50 shares more I can raise the money to pay for it as soon as I get the 50 shares that I will finish paying for on the 20th inst. or I will give you my note for the amount with interest since the different amounts have been paid in and will pay the note off in twelve months and you can hold the 100 shares as security."

I remember getting that letter. I did not make an arrangement with him in accordance with that letter. I had nothing to sell. I did not want to sell my own, I thought I had a mighty good pay-

ing thing. I had no stock to give him. Then on December 18th, 1902, he enclosed me as treasurer or chairman of the syndicate $250 as final payment for stock of the blast furnace syndicate and I deposited it. He said in his letter: 1051

> "I am sorry that I could not get another lot of this stock, but thank you for the information given as to where I might possibly get it, and I will try it in that direction."

There was a premium offered at that time in Chicago, I have been informed, reliably. 1052

The next letter from Mr. Stone, which appears here is September 29th, 1903. He says:

> "I am in receipt of your circular letter of the 25th regarding the sale of bonds, and note that my *pro rata* of the bonds amounts to $2,000.00.
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> "I am very sorry, but I am not in position now to take them. In addition to the Blast Furnace stock, I have bought 100 shares of stock in a boat line on the Lakes and had to borrow a part of the money to pay for it. On account of the present financial situation, I am afraid the bank will not want to renew the loan, and it will, therefore, be necessary for me to sell some of the stock. 1053
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> "Thinking that perhaps you would like to buy the stock that I have in the Blast Furnace Company, I want to offer it to you before trying to sell it elsewhere. If you want this stock I will let you have it at what it cost me, plus the interest.
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> "As it will be necessary for me to raise this money within a short time, will be glad to hear from you as early as convenient."

1054 I remember that letter. I wrote him a letter on December 17th, 1903, regarding the condition of the Company and the sale of the bonds. I believe I explained before that we found that the furnaces did not work right, that we needed more money. In this letter I say as follows:

"On September 25th we addressed you stating that the funds available for purchasing and improving coal, ore and furnace properties had been exhausted and that the Directors, after thoroughly canvassing the situation, decided to ask the Stockholders to subscribe toward an issue of $750,000 bonds in the Company's treasury."

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Those are the bonds of that Sheffield Coal Iron & Steel Company.

"We also stated that the product of the furnaces had declined from $24.00 to $11.50 per ton; since that time a further decline has set in so that up to a week ago No. 2 Foundry Iron was selling at $9.00 per ton."

1056 That was true, in accordance with my statement to-day.

"This was brought about by the officers of two large Southern companies getting into a war on the question of prices and, not being themselves interested in their companies' shares to any extent, a sacrifice was entailed by them and by others. Some of the Stockholders have since protested and iron has advanced to $9.50 per ton."

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That was a fact.

"We have constantly endeavored to produce iron at lower costs and have operated the first half of December at a cost of $9.70 per ton, and, as on December 15th a ten per cent, reduction in wages went into effect at the furnaces, the Directors now feel that they are in a position at least to hold their own. Only one furnace, however, is in operation. While the decline was keenest the second furnace was blown out."

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Some accident did not happen to it; it did not work right, it had to be blown out.

To the Referee:

It is hard to say that was not an accident; some of the brick in the inside of the furnace lining fell down, and it might be an accident or it might not. The blowing out of a furnace is done for the purpose of cleaning it out or repairing it.

I testified yesterday that I made an arrangement with Mr. Ellwood in December by which he relinquished $50,000 of his $350,000 subscription. 1059
And that it was $10,000 out of that $50,000 which I let Mr. Alder have. I had an interview with Mr. Ellwood and some correspondence on the subject. The letter shown me of December 8th is a copy of the letter I sent Mr. Ellwood.

Mr. Littleton: I offer this letter in evidence. The paper was admitted in evidence and marked Defendant's Exhibit No. 4, October 26th, 1911, C. B.

1060 The letter of December 19th, 1902, shown me I received from Mr. Ellwood.

MR. LITTLETON: I offer this letter in evidence. The paper was admitted in evidence and marked Defendant's Exhibit No. 5, October 26th, 1911, C. B.

I knew Mr. Cluff. I became acquainted with Mr. Cluff at the time that we bought into the Iowa Barbed Wire Company of
1061 Allentown. I met the gentleman in New York; as to the date, it was in the year—somewhere in the nineties. I do not exactly remember the date. He was then with the Iowa Barbed Wire Company. The Iowa Barbed Wire Company was taken into the Consolidated Steel & Wire Company of Illinois in 1892, or 1893, when the consolidation was organized there it came in at that time. That was 1892 or 1893, well, that is the time I got acquainted with Mr. Cluff first. Mr. Cluff's particular position in the Iowa Barbed Wire Company was that. He was in the city office, I think he was secretary of the company, but he was in
1062 charge of selling too, and corresponding and things of that kind. After the Iowa Barbed Wire Company was absorbed by the Consolidated Steel & Wire Company of Illinois, he resigned from the Consolidated Steel & Wire Company. Mr. Gates gave him a position in the Illinois Steel Company. That was an independent company. Mr. Gates was President of it, they were all together in one building. Mr. Cluff did not go immediately with the Illinois Steel Company when the Iowa Barbed Wire Company was taken over by the Consolidated Steel & Wire Company of Illinois. I believe

he went into some private manufacturing business for a while, but I know that Mr. Gates later gave him a position with the Illinois Steel Company. The Illinois Steel Company had its offices in the same building with the Wire Company, in the Rookery Building. The offices of the Consolidated Steel & Wire Company of Illinois were in the same building. Mr. Gates was not President of both; I was President of the Consolidated Steel & Wire Company, and he was President of the Illinois Steel Company. The only cooperative arrangements between the two companies was that we were the great big purchaser of their product. That is, the Consolidated Steel & Wire Company of Illinois purchased the product of the Illinois Wire Company. To the best of my memory Mr. Cluff took the position as salesman when he went with the Illinois Steel & Wire Company. He sold to our company. He was salesman. Now I do not exactly know—he would sell steel rails, he would sell the product of the company. Our company bought of the Illinois Steel Company mostly steel billets and wire rods. And from that we manufactured our wire. I am not clear on whether Mr. Cluff's office was in the Rookery Building. Mr. Cluff, when he became a salesman for the Illinois Steel Company, the best of my remembrance was, I am of the opinion simply, that he was at first in the Illinois Steel Company office in Chicago, but he later on, I found that he was in the Illinois Steel Company sales office here in New York; but whether he had been really a salesman for the Illinois Steel Company in New York from the beginning I am not positive of; I did not pay attention to it. At that time I did not see him very often. Until I came to New York I did not see him

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very often. You see he left the Iowa Barbed Wire Company when it consolidated, he resigned. After I came to New York in 1901 or 1902 and had my offices in the Empire Building I saw him often. His offices were in the same building. I saw him then like men that know one another in the same building, I only know that at times I might see him two or three times a week, and then again I might not see him for a month. I spoke to him. I knew him personally. His position, the same, salesman.

1067 As to whether Mr. Cluff had, with the exception I have stated, been in any other business from 1892 up to 1902, except the steel and wire business, I think he once had a manufacturing business of his own. I do not know where it was, but I am of that opinion. I do not think he went directly from the Wire Company to the Illinois Steel Company. I recall having had a conversation with Mr. Cluff regarding the Blast Furnace Syndicate. I remember having met Mr. Cluff in the Empire Building. It was during the inception of the thing, it was not over yet, we were starting

1068 talking about it, Galey and Walker were talking about it. It was about April or May, 1902. At the first conversation I had with him about it Mr. Cluff asked me what about these rumors that were going around about going into the blast furnace business, and I said, "Well, there is a scheme up, Walker is talking about it," or, "Gayley is talking about it." And later, from time to time as we met, he asked, "Well, how is things progressing?" I think once he asked me, "Who is in it," or, "Who has subscribed?" Now, I do not know whether he asked me to send him a statement of the subscribers up to that time, or whether I was

in a hurry and said, "Well, I will send you a list of the subscribers." I am not clear on that. But he came later on to my office and subscribed. I did not tell him that nobody was making anything out of this thing, that every man was putting in his dollar with everybody's else, that nobody would have any advantage over anybody else, this was a very valuable thing. I told Mr. Cluff that Mr. Walker and Mr. Gayley considered this blast furnace proposition a good one, that they assured me that they could make foundry iron at $7 a ton. Whether I showed him the figures that Walker had given me I could not tell at this minute. I have no remembrance at all of his asking if I recommended it or of saying that I did as he testified. He said that he did not pay much attention to the details because his confidence in me was of the highest, and that he had never heard of the United States Iron Company and did not know that I was connected with it. I did not make any statement to him that this was a good investment, and everybody was going in on the same basis as everybody else, and that I made a special point of that, nobody was making a dollar out of it, that everybody was putting in their dollar with everybody else, and that it would be a great investment, that it was something we could put in our boxes and forget all about, and nobody had any special advantages or would have, and that it was a good thing, and that I recommended it. I was not in the habit of making speeches. I did not make any such statement. He did not say to me, "Mr. Edenborn, if you recommend this, as you have, I am willing to put in $15,000". He asked, "Can I get some of it?" When he says that he first mentioned the Blast Furnace Syndicate to

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1072 me, inquiring about it, that was true. I do not know as he said the Blast Furnace Syndicate; he said, "What are these rumors about your going in with the other people, with the Walker crowd," or whatever was said, the words I do not remember, "into putting up a blast furnace." That was the first inquiry. I do not remember the date when he subscribed. Probably in May, about that. I do not know the date any more.

I did not in any way that I remember solicit him to become a subscriber to this syndicate. My
1073 memory on the subject is that I did not. I remember having a conversation with Mr. Cluff in the Waldorf in the early part of 1901. It was just a casual meeting one evening when I was in the Waldorf, and I happened to see Mr. Cluff come in there. I had a casual conversation with him. We sat down on a seat and talked together quite a while in substance. Mr. Cluff asked me, after talking about the weather and such things, "Well, what is this, and is it really so that you and Gates parted company?" I said, "Yes, we have parted company." He says, "You must have been together pretty near eighteen or twenty years?" I
1074 said, "Yes, pretty near that." He says, "I was the most surprised man when I heard about that." I said, "Yes, we have parted for good, I have done with Gates." I said, "The last thing we had together—I told him, 'Gates, you and me have got to part company, we can't pull together' and he said, 'Well, let's see, William what we have got together.' I said, 'Well, we have got the United States Iron Company and the Kansas City Southern Syndicate.' I said, 'Which will you take?' He said, 'You take either one of the two.' I said, 'I choose the United States Iron Company.' And I took over his stock." "Well," he says, "I could

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not hardly believe it when I heard it." He says, when I mentioned the United States Iron Company, "Is that Gates' Alabama ore land?" I says, "Well, Gates, Lambert, Ellwood and myself bought this land together."

This conversation was prior to this Syndicate. That was before the Blast Furnace Syndicate was got up or thought of. I never had any other conversation with Cluff that I recall not beyond civilities when I would meet him.

Mr. Coles is one of the gentlemen to whom I referred yesterday as having started in the Bradd- 1076
dock Wire Company as a sales agent. That company went into the Consolidated Steel & Wire Company of Illinois; he went in with it. His position after that company was absorbed by the Consolidated Steel & Wire Company of Illinois was the same thing, except it was broadened. His office was in Pittsburgh. He continued on after the Consolidated Steel & Wire Company of Illinois was absorbed by the American Steel & Wire Company of Illinois. In the same position, except at a later period he was moved from Pittsburgh to New York, and was given the New York district. I do not know the year that was in. He contin- 1077
ued after the American Steel & Wire Company of Illinois was taken over by the American Steel & Wire Company of New Jersey. And he continued after the American Steel and Wire Company of New Jersey was taken over by the United States Steel Corporation. I first came to know him personally, during the time that the Braddock Wire Company was not yet consolidated into the Consolidated Steel & Wire Company. I could not tell the year now no more. The Braddock Wire Company came into the Consolidated Steel & Wire

1078 Company of Illinois in 1892 or 1893. That is about the time when I got acquainted with him.

I think I came to New York about every four, five or six weeks, I do not exactly remember; sometimes oftener and sometimes not so often. I usually saw him then at the city office. Our relationship was the ordinary relationship between the President of the company and the men under him, they were all nice and deferential, talking things together. I considered him a good, valuable man. He was under me as a salesman for the

1079 Consolidated Steel & Wire Company of Illinois, and also under me in the American Steel & Wire Company of Illinois, and so on up to the time the United States Steel Corporation was formed. I told you while I was the manufacturer through the whole thing, Mr. Gates was really the head man of the sales end, the sales of the product of the company. I think Mr. Coles in the various evolutions of these steel companies subscribed in turn as they were organized, and turned in his stock to the new concern and took stock in the new concern. I remember whenI first had a conversation with Mr. Coles about the Blast Furnace syn-

1080 dicate. It was before the Syndicate was in existence. I mentioned to him one day, or he asked me, we got to talking about it, I think he asked me, "What is this rumor?" Now whether Mr. Cole told him, my secretary, whether he told him I do not know, he seemed to know that there was something brewing. And I told him there was not by any means anything worked out yet, but there might be later, we were thinking over it, dreaming over it.

I think that it was somewhere around March, 1902 it was before anything was written out. After that we would meet in the elevator or on the

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street in front. Mr. Coles I met several times also in a broker's office. But as to talking—in fact we talked every time a few words, talking on this subject, I think there was only that first time and later on he asked had we proceeded with that, what was being done, or words to that effect. And he mentioned to me that while he had not gotten any steel underwriting except what I had let him have, that he proposed to get into this. By steel underwriting I mean the United States Steel Company. I had let him have $20,000 of that out of mine. He says while he had not got nothing for himself, except all he got was what he got from me, he proposed to get into this one. I do not think I did let any of these other men, Alder, Cluff or Stone, have any of my steel underwriting. I do not know whether they had any of the steel underwriting, but I doubt it. I did not tell Mr. Coles that I was forming this iron company and wanted my friends to come into it, that I thought it would be a good thing, that I would like him to take some stock in it.

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When Mr. Coles said that he wanted some of it I probably said—I do not know but I did say that I would be glad to have him. But I did not coax him to take it. I said that I was going to purchase some ore properties—I did not state just what properties—ore properties in the south, and he said his recollection was that I told him that these properties had been paying a dividend, selling the ore, and that I thought by converting it into pig iron I could make more money out of it,—about that—that was a year after the thing had been going when I told him one day that we had made money out of the mining of the ore. That was at a time way later after he had subscribed and after the furnaces had been

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erected according to these blue prints that the blast furnace men had made, and they did not turn out then. He, of course, wanted then to know why there was no dividend. I did not say that everybody would come in on the same basis so far as money was concerned, or that I had subscribed $500,000 or something of the sort, or that the subscriptions were to be paid in cash. I did not say that everybody was to come in on the same basis, dollar for dollar, and every man's money would be alike, or some such expression as that.
1085 I did not tell him that no one was to have any advantage over the other, or that every man's dollar would be alike. I did not say that the properties I proposed to purchase were good properties, and that by building blast furnaces and selling pig iron we could make a good thing out of it, and thereupon I showed him a list of syndicate subscribers and the syndicate agreement. As to subscription, he came into my office and subscribed for $20,000. I did not tell him any such thing that every man's dollar would be alike, or that I could make a good thing out of it. "Make a good thing"—those words I have not used. I
1086 may possibly, in fact, I believe I did say that Walker stated that he was going to make iron at $7. He was sufficiently a salesman posted upon the steel market to know that steel was selling at $17 and $18. I think that is right that I insisted upon his coming into the reorganization and taking the collateral bonds, which he did to the extent of $6,000. I think that is true. You see when we had no money no more it was no use to let the company go and be sold for the debt. I think I took a hundred and some odd thousand of this Sheffield Coal, Iron & Steel Company bonds

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and E. C. Converse took them and others, and the idea was so expressed and so told the stockholders, now, if anybody takes these bonds at 90, according to the amount of stock they hold, why everybody is practically in the same position as far as the interest in the company is concerned. So I told that to Coles. I did not ask Mr. Coles to be a subscriber to this Blast Furnace Syndicate or solicit him in any way at all. He came to me. About a year before this or some time before this I had an underwriting in the United States Steel Corporation. I let Mr. Coles have twenty thou-

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sand dollars of my subscription. That was not at his request. I believe I offered it to him. I cannot tell you the words. I do not think any of these other men, Cluff or Alder or Stone, asked me for any of this subscription to the United States Steel Company. After Mr. Coles had subscribed for $20,000 to the Syndicate agreement he came to me, I think it was a week or two after, it may have been—well, I think it was within ten days or two weeks, and he said: "Mr. Edenborn, I have received a letter, of which this is a copy; I have got a friend that is interested in ore lands on the Tennessee River up near Chattanooga; he has

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got some idea of a consolidation; but," he says, "I didn't know hardly whether I should bother you about it, because your ore lands are down near Sheffield, while this man's ore lands are up near Chattanooga, but," he says, "I am not sufficiently clear what could be done in a case of that kind, and I thought, well, I would lay it before you." And there is the carbon copy of that letter. Mr. Coles gave me this letter. That conversation with Mr. Coles was within a week or two of his subscription. I think it was after it.

1090 (Handing paper.) This carbon copy shown me is the letter which Mr. Coles gave me at that time.

MR. LITTLETON: I offer it in evidence. The paper was admitted in evidence and marked Defendant's Exhibit No. 6, October 26th, 1911, C. B.

He gave me the name of the man who signed this letter, I knew it at the time, but I do not remember now. This statement which follows it is
1091 a statement of the condition of the property. Mr. Coles submitted that statement as coming with the letter.

The United States Steel Corporation or the Wire Company, which was a subsidiary company, at that time issued to its men and officers a book. The book shown me entitled "The American Steel & Wire Company of New Jersey, Corporate information respecting this and other companies, date 1900;" or copies of it were issued by the American Steel & Wire Company to its heads of departments and officers. The higher officers had their name in gilt put on it to them they were
1092 sent to their offices. The balance of the people would go to the distributing office, I do not know who was exactly in charge of that, and get one. This one has the name of William Edenborn on it. I was an officer of the Steel & Wire Company at the time. As far as I remember that was the first book that was gotten out, in 1900. There was one gotten out in 1901. That book was in existence and is to-day used. This book purports to contain a statement of the organization and official directorates of the various concerns comprised in the American Steel & Wire Company of New Jersey, it was gotten up for the purpose

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of furnishing this information to the officers and heads of departments. The book which you show me is one which I received in 1900 or 1901 from the American Steel & Wire Company of New Jersey. The last page of the book shown me was in the book at the time I received it. I have seen other books, other copies of this book besides the one sent you. They were similar to this. They were all alike that the officers of the company had and the heads of departments.

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Mr. Littleton: I offer this book, and particularly the last page in the book, in evidence.

The Referee: I think it is a fact which may be taken into consideration. They had opportunity of possessing themselves of this book, which was issued for that purpose; but I do not think it is connected with Sim or Cluff. I admit it as to Alder, Coles and Stone. And excluded it as to Cluff and Sim.

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Mr. Littleton: As to the exclusion as to Cluff and Sim, on the question of good faith, I except.

Coles at one time asked me if that was true about my split with Mr. Gates, if it was true that Gates and me had parted company. He couldn't hardly believe it. I said, yes, we had parted company for good. I told him exactly how the thing came about, that Gates said, "Well, what have we jointly?"—when I put it up to him—"What have we jointly?" I was in the United States Iron Company in the Kansas City Southern Syndicate. "Well," he says, "All right, which do you want? Let them go in both at cost and you can take

1096 either." I said, "I will take the Iron Company, Mr. Gates, and you take my Kansas City Southern interest." I told him that that was the way I got Gates' interest in the United States Iron Company. That was prior to this Blast Furnace Syndicate scheme. I had that conversation with him in the Empire Building. I know about the circulation of this trade paper known as the Iron Age. The total steel and blast furnace interests of the country seem to keep it. Every office I have ever come into of any moment in steel and iron
1097 products has a copy of it. It is considered an authority in the steel and iron business. When contracts have been made it was considered when I was active in the steel and wire business, I do not know how it is to-day, it was customary to make contracts on sliding scales and name the Iron Age as the authority on which to adjust contracts.

Mr. Littleton: I offer in evidence on page 36 of the Iron Age of the issue of Thursday, September 18th, 1902, an article which has been marked Defendant's Exhibit I for identification.

1098 The paper was admitted in evidence and marked Defendant's Exhibit No. 1, October 26th, 1911, C. B.

I know August Mann. He was one of the Syndicate Managers. He was General Superintendent of the Steel & Wire Company's Pittsburgh plants, the old Braddock Wire Company's plants. He came to be a Syndicate Manager when Mr. Gayley was told that he could not serve, by the President of the Steel Corporation, that he could not serve as a promotor for a new blast furnace proposition; then Mr. W. R. Walker, he was to

be the third one, it was to be Edenborn, Walker and Gayley, Gayley was told that he could not serve, he was the first one who asked Mr. Schwab, I think he was President then, and he told him no, it was not proper; then an agreement was drawn up, a form merely, naming William Edenborn, W. R. Walker and a third one left blank; and then Mr. Walker went and asked about it, and he was told he must not take it, the President said "No, you must not serve." Then Walker said, "Well now, let's see, who can we get? Now, suppose we put in my brother, J. C. Walker, and put in August Mann." And we put them in, both being subscribers to the Syndicate, and having expressed themselves that they would become Syndicate Managers. August Mann subscribed $100,000. There was nothing said at the time of his subscription about the putting in of his property in payment of his subscription. At the time his subscription was made it was not discussed at all among the Syndicate Managers that he was to be allowed to put in his property. I knew about his property at the time of his subscription, I knew that he owned it. His property was located in the Russellville ore district in Alabama. I knew about the character of the property, I had seen expert reports on it. Mr. J. W. Bledsoe and Mr. McLanahan, whose initials I have forgotten, reported on it. McLanahan is dead. Bledsoe was an expert and he is dead. McLanahan died I guess about three years ago. I guess it was within a month of his subscription or of the syndicate finish of April 15th that negotiations were taken up looking to the taking of August Mann's property into the syndicate. His property that went into this syndicate consisted of ore

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1102 lands in the Russellville district. He had property there that the Board stated contained a million and a half tons, one of the experts stated it contained two million tons of iron ore. Mr. Walker and Mr. Gayley looked over the reports as to this property. I consulted with them before the Syndicate Managers determined to buy August Mann's property. At the time we took up the question of buying August Mann's property the subscriptions had not been closed. August Mann did not apply for more
1103 than $100,000 at that time. He wanted that $100,000. Later on he did ask for more subscription when he found out he had not gotten a hundred thousand dollar subscription. The case came this way, Mr. Mann subscribed $100,000 to the syndicate, intending to pay for that and to mine his own ore. He figured that the United States Iron Company, going out of existence as you might say as a seller in that market, that he would have a splendid chance to make money out of his ore properties. Mr. Gayley, Mr. Walker and myself, who were the three Executive Com-
1104 mittee members of the United States Iron Company, when they could not serve on the Blast Furnace Syndicate, we made Gayley and Walker directors by me giving them a qualifying share, and put them with me on the United States Iron Company, they put a good deal of money in it—they had no interest in the United States Iron Company up to that time. Now then, they said, "If we built two furnaces, these expert reports on the United States Iron ore property say there is probably sufficient to last us twenty years, but we ought to get all available good ore

properties tributary to the Sheffield proposition. What more ore properties can we get?" Well, I looked over the field, there were some small properties, the biggest one then known, the biggest one I heard of was this August Mann deposit, estimated at a million and a half tons, and by one estimated at two million tons. Now then they say, "Well, can't you get that? If we first build furnaces we always find that ore properties go up after the furnaces go up." Then they say, take it up with me. I said, "Well, I do not know, I 1105
may see August Mann and ask him what he wants 1106
to do about it." Well, August Mann had the knowledge of the iron ores as estimated by Dickman and others in the United States Iron Company. Then he says, "I will take for my property $200,000." And I laughed at him. I says, "Why, August, it only cost you about $30,000." "Well," he says, "if seven million tons of United States iron ore property is considered by Mr. Walker and Mr. Gayley and people who know all about ore property, is considered to be worth par, why, then this million and a half by the same token ought to be worth about $200,000." I say, 1107
"Oh, your granny, shut up, you could not get that." He says, "Well, I will mine it and I will make money." I said, "All right, I talk to you a little further," and I said, "August, suppose I were to tell the people, Gayley and Walker, that you would take $100,000?" "I will never take a hundred thousand dollars as long as I live for that property." Well, I talked it over with Walker; Gayley was not then available; and I told him what had happened; and he figured on it. He says, "What is the freight rates?" Well, we figured that out. As I explained yesterday, the

Sheffield side is here on the Tennessee River, the Tennessee iron ores are out here, and the Alabama ore district, the Russellville ore district, is over here. The freight rates that we paid and pay to-day from the Tennessee district, from the Smith mines, are 30 cents a ton, and from the West Point mines they are 25 cents, and are that to-day, for a ton of ore, to bring it from the mine to the furnace. The freight rates on the Russellville district ore, in which district we did not have heavy holdings—our heaviest holdings were
1109 in the Tennessee district—that takes a freight rate of 12½ cents to these furnaces at Sheffield, a saving of 12½ cents for freight per ton over the lowest freight rate we had from Tennessee, as they were then and as they are now. The price of $100,000, which he said he would not take, would have brought this ore, on the estimates that we had, say 7 cents per ton, and we would save, to get that ore to the furnaces, 12½ cents on each ton in the freight rate. So the thing seemed so exceedingly proper to acquire it that Walker said, "Well, you close with him the best
1110 you can, that is a good proposition." And I later on met him, I came here sometimes, once I met him in Chicago and in Pittsburgh, and I talked it over with him again. I said, "You have got to sell us that ore property; don't be holding back all the time; I think it is a good thing for you; I will tell you what I will do, we will give you $101,000, now you cannot get any more." He says, "Well, I do not like to see it go at that price," he says, "it is too cheap." "Well," I say, "let it go, August, it is a good thing." He says, "I will only let it go on one condition, that I get paid for it in stock of the Company, because I want to get

paid for that ore." I says, "Well, we will give you $100,000 of stock in payment and $1,000 in cash." "Well," he says, "you seem to advise it that way," he says, "I would like to pay attention to you, but I do think I am selling that too cheap at that price." I say, "August, let it go at that;" and he said, "All right, let it go." So I reported it back again and he said it was all right, Walker fully approved of it, he was glad that we got it at that price, for the reasons stated. He was to get a hundred thousand dollars of stock subscription and we was to get a hundred 1112
thousand dollars of ore land, and when I come back from New York I find that the thing is oversubscribed, there was no more to be had, and therefore he got only $100,000 of stock issued to him, and when he found that he could only get $100,000 he says, I have not treated him fair, he ought to have the $100,000 that he had subscribed, I ought to have cut down other people and not cut him out on the hundred thousand dollar subscription, and give him this, or vice versa, whichever way you put it, the hundred thousand in subscription and the hundred thousand he paid for. Now, he grunted around me and worried me 1113
for some time, and I said, "August, I will try and see what I can do for you;" and when I found an opportunity to get stock from Ellwood, although I understood he expected me to help him financially to get it, I got him $40,000 from Ellwood, and I paid for it on his behalf, because I had of course cut him down heavy, practically a hundred thousand dollars that he first wanted.

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To the Referee:

He wanted both the hundred thousand subscription to the stock and one hundred thousand dollars for cash. He wanted the stock, and he did in fact get $40,000 from the Ellwood subscription. He did not get any more stock, there was no more to be had then.

To Mr. Littleton:

It is a fact that Mr. August Mann subscribed
1115 $100,000 at the outset of the thing without any consideration at all of his property. When I took up the negotiations to purchase his property and finally agreed on $100,000, it is a fact that he treated that as an additional subscription. How he looked upon it, he was to get a hundred thousand in payment of it. It is a fact that Mr. August Mann originally subscribed $100,000 without any consideration at all of it being paid in property. He subscribed that when Gayley and Walker were to be the syndicate managers. It is a fact that after that, on account of the location of this property and the desire to have it,
1116 negotiations were taken up for the purchase of the property from August Mann and that the price of $100,000 that I have stated was agreed on in the manner that I have stated. It is a fact that he understood that he was to have $100,000 of the stock of this concern, and $100,000 in cash to pay for his property That is right. And that he was in addition to that to have the $100,000 additional subscription which he wanted.

To the Referee:

For which he was to pay cash.

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To Mr. Litteton:

It is a fact that I procured for him on account of the $100,000 in stock for which he was to pay cash, $40,000 from Mr. Ellwood and that I paid for him the $40,000 in to the Syndicate Managers. So that, as he viewed it or claimed, he had been cut down $60,000 from the total of his subscription. That is proper. Well, I paid $39,000; I did not pay $40,000. The $1,000 cash that he was to get we did not bother about.

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To the Referee:

That makes it even.

To Mr. Littleton:

I put up the $39,000 for August Mann because he had been for years, I guess he had been for perhaps ten or fifteen years at times depositing a little money with me as he saved it. He had at one time up to $10,000 with me. Then he sometimes bought a piece of property, a house to live in or something, and he would draw on it; and so of course he told me that his mother, who was my sister, she arranged for the sale of property in Braddock, and I made the payment at the time because the syndicate agreement was drawing to an end and had to be closed out, and I made the payment, and he has paid me back everything to-day. August Mann is my nephew; his mother and I are brother and sister.

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I got confused about the evidence I gave before this trial. I was asked is this $100,000 in stock which he paid to August Mann in payment of his subscription. And I believe I said, "Yes" at the time. The application of that subscription I was

confused in my mind, and I answered that wrong at the time. These are the true facts as it came about. I did not make any such statement as is contained in paragraph Third of the Alder complaint which you read me.

"Fourth.—That as a further inducement to subscribe thereto defendant in and by said agreement represented and stated that an opportunity was afforded to acquire for a cash consideration the ownership, control and possession of the United States Iron Company of New Jersey, capitalized
1121 at $1,000,000 at par. That at or about the time defendant prepared the syndicate agreement and proposed to plaintiff to subscribe thereto, the defendant was the owner of about 5,365 out of a total of 9,250 shares of the stock of the said United States Iron Company, and with intent to deceive and defraud the plaintiff and other subscribers had conceived the design and intention of selling and transferring his said stock to the said syndicate managers for cash, at par, and in so doing to relieve himself of said stock and to impose the same upon the persons whom he had induced to become subscribers to said agreement, and by fraud and
1122 deceit and intending to deceive and defraud the plaintiff herein, concealed from plaintiff and other subscribers the fact that the defendant owned a majority of the capital stock of the United States Iron Company, and controlled said company."

The allegations of paragraph fourth of his complaint, which you read me, are not true.

The allegations of paragraph Fifth of his complaint which you read me are not true. At that time Mr. W. R. Walker and his brother, J. C. Walker, another syndicate manager, and Mr. Winslow and Mr. Waterman, Mr. Louis Ruiloba,

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Mr. W. M. Douglass, Mr. John Gray—oh, about a dozen men right there in the building had been told by me that this had not cost me par, while it was put in by Gayley, with the full consent and recommendation that we get the Ellwood stock and put it in at par; that if I could not get the Ellwood stock I would try and get the old man down to the cost to us, always plus interest, that then it should come in at my own cost; and it was put in by Gayley, with the full consent and Mississippi Valley Trust Company had not then agreed that they would put it in at what it cost them, and I had told them that I would try and get all of this stock at 70, and I finally did so succeed. There was nothing to defraud anybody. It is not true as plaintiff further says in his complaint:

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"That the defendant on various occasions between said April 15, 1902, and December 6, 1902, repeated and reiterated said statements and each of them to the plaintiff and urged him to become a subscriber to said syndicate agreement, and the plaintiff being induced thereby, and relying upon the truth of said statements and representations and believing the same to be true, and having no knowledge or information to the contrary, consented to become a subscriber to said syndicate agreement in the sum of $10,000."

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As to the allegation:

"And at the same time promised and agreed to pay to the defendant the sum of $136.08, which the defendant represented and stated was the interest due on account of deferred payment of said subscription to said

1126 syndicate agreement, and paid to the defendant, at his request, on or about the 17th day of December, 1902, the sum of $10,136.08, and on or about January 1, 1903, received from him a certificate for one hundred shares of stock in the Sheffield Coal & Iron Company, in the name of Caroline E. Alder, and was notified by the defendant that he had been made a subscriber to said syndicate agreement."

1127 The part that he has paid in that money is true. The part that he got the stock is true; he was told that it was stock that I got from Ellwood for his benefit, and that he got it through the courtesy of Mr. Ellwood. Why didn't I sell it to him out of my own if I wanted to get rid of my stock? Why didn't I sell Stone? Why didn't I sell August Mann?

He further says:

"That each and every of the said statements and representations made by the defendant were false and fraudulent and known by him to be so."

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He knew he was lying when he made that statement.

As to the allegation:

"And were made with intent to deceive and defraud the plaintiff."

He knew I was not deceiving anybody.

The allegation:

"That the said syndicate was not being organized by defendant in good faith; that

each of the subscribers, according to their interests, did not have equal rights and did not stand upon the same basis."

is wrong; it is not true.

As to the allegation:

"That every man did not put up his dollar against every other man's dollar; that there were special advantages to the defendant and to the said August Mann."

There were none to me. I have explained that August Mann transaction. He put his iron ore in for stock in the new company, not for money; he wanted to get the benefit of it in that way. 1130

As to the allegation:

"That the syndicate did not propose to purchase only valuable and paying properties; that he, the defendant, did not propose or intend to pay and did not pay his subscription in dollars, but largely in stock of the United States Iron Company; that plaintiff would not by not subscribing thereto miss the opportunity of a lifetime; that the said properties were not earning dividends before anything was completed, and that said stock was not earning so much that the plaintiff could put said stock away and forget that he had paid for it." 1131

I have already testified that I never made any such statements.

It is not true as stated further on:

"That the defendant and the said August Mann had conceived and concocted a scheme

1132 or plan whereby said syndicate in which said Mann was interested should be transferred to said syndicate managers, and thereby be imposed upon said subscribers."

Those allegations which have been made in substance in the case of Sim, who brings an action against me and who has assigned to him the claims of Stone, Coles and Cluff; and the same statements which have been made in reference to their respective claims, being prosecuted by Sim,
1133 as are made in here, which you have read to me, are false.

Out of all the stock I received five thousand and odd shares. I never sold or parted with any of that stock; I have every share and more. I transferred some of the United States Iron Company stock to Walker and Gayley to qualify them. Out of all the stock I got in the Sheffield Coal & Iron Company by my subscription I have never sold my interest or any part of it or parted with it. I have got it and more to-day. More stock than I had. I bought a little at that time from Harper. I never parted
1134 with any of the original subscription which I made except the $25,000 which I carried for Walker, and I have got that yet. I carried that for him, but I had to carry it and I have got to carry it still. As to whether I have parted with any of the bonds which I had, which I took, either of the old Sheffield Coal, Iron & Steel Company or of this company, I think we had to give up the bonds of the old when the new bonds were issued. That was an exchange, but I never sold nothing to get a penny out of it; no, sir. I have got three-quarters of a million in it approximately and I never have got anything out of it any more

than anybody else did. And I never have sold any of it. 1135

I had an interview with Mr. Stone in my office after his subscription to the syndicate agreement, concerning my interest in the United States Iron Company, not soon after. At one time we talked of this proposition. I do not know whether that was in my office. I think it was. I think it was at 71 Broadway, when we talked over it, early in 1903, so far as I now remember. Up to that time things looked pretty good yet, and he told me that he was glad to know that his friend, Pete 1136
McIllvried, whom he had seen, was in the company, and that Pete McIllvried had told him that he personally had been to see the iron ore property, and that the company certainly had properties acquired out of which they mined very cheap. I am not positive that anything was said at that conversation concerning my prior interest in the United States Iron Company. I doubt it. I doubt it that I said it, but he knew it all the time. After Mr. Stone had sold the property and come on to New York I saw him once when he was in the office there, and he had heard then, like the balance of us, that the furnaces were wrong and that 1137
things were not going good; that was some time afterwards. In the conversation he said that he knew that I was in the Iron Company all right. He was inquiring about the progress of the company, and we talked about it generally. He says what was the matter with the property, and he asked about the coke and he asked about the ore in that conversation that came up; he knew it. I think Mr. J. E. Cole will remember it, because he talked it right openly there before Mr. Cole. Mr. Cole is here. I think perhaps Cole will remember it better than I do. He was my

In *Masson* vs. *Bovet* (1 Denio, 69), the leading case upon this subject, the Court uses some very pertinent language concerning restoring what has been received:

> "This is not exacted, it is said, 'on account " of any feeling of partiality or regard for the " fraudulent party. The law cares very little " what his loss may be and exacts nothing " for his sake. If therefore he has so en- " tangled himself in the meshes of his own " knavish plot that the party defrauded can- " not unloose him, the fault is his own, and " the law only requires the injured party to " restore what he has received and as far as " he can undo what has been done in the ex- " ecution of the contract. This is all that " the party defrauded can do, and all that " honesty and fair dealing require of him. " If these fail to extricate the wrongdoer from " the position he has assumed in the execution " of the contract, it is in no sense the fault of " his intended victim, and upon the principles " of eternal justice, whatever consequences " may follow they should rest upon the head " of the offender alone."

FOURTH: DEFENDANT'S FRAUD WAS UNDISPUTED, AND A CLEAR CASE WAS MADE FOR RESCINDING AN EXECUTED CONTRACT.

Specification of Error No. 8.

I.—Defendant's answer did not deny the allegation of the complaint which the Referee found as a fact, that it was his duty to make to the subscribers full and complete disclosure of his interest in the United States Iron Company, of his stockholdings therein, and of any other interest which he had in said Company, and in the proposed scheme provided for in the syndicate agreement, and to give to the

subscribers, and each of them, as full information as the defendant possessed relating to said subscription, and of any fact which would affect their interest or the interest of any or either of them.

II.—The complaint alleged, and the Referee has found, that he concealed from plaintiff his ownership of a majority of the stock of the United States Iron Company, and while acting as syndicate manager, and agent and attorney of the syndicate subscribers, was engaged in procuring the sale of his own property from himself to himself as syndicate manager, and that having made a subscription of $500,000. payable in cash to the syndicate, he did not intend to pay in cash, but by his stock in the United States Iron Company, paying only sufficient cash to make up any deficiency.

Tyler vs. *Savage*, 143 U. S., 79, at page 98, says:

> "This suppression of a material fact which
> "Tyler was bound in good faith to disclose,
> "was equivalent to a false representation."

Crosby vs. *Buchanan*, 23 Wall, 420, at p. 457.

Cleveland vs. *Richardson*, 132 U. S., 318.

Stewart vs. *Wyoming*, 128 U. S., 383, at p. 388.

III.—These frauds were clearly proved and not denied; plaintiffs were deceived and influenced thereby and they presented a plain case for invoking, if it had been necessary, the power of a Court of equity to cancel an executed contract.

Atlantic Delaine Co. vs. *James*, 94 U. S., 207.

Union R. Co. vs. *Dull*, 124 U. S., 173.

Maxwell Land Grant case, 121 U. S., 325.

IV.—In the *Hecksher* case, at page 222, it is said:

> "It must be quite as elementary and true
> "that if one by misrepresentation or suppres-
> "sion of facts when he ought to speak, in-
> "duces another ignorantly to make a con-
> "tract appointing the first his agent and con-
> "ferring upon him discretionary power to
> "purchase his own property, the contract is
> "voidable and *even if executed* may be re-
> "scinded and the money recovered back on
> "restoration of what has been received."

The rule is thus stated in *American and English Encyclopedia of Law*, vol. 24, p. 613:

> "Yet where it clearly appears that the
> "party against whom rescission is sought
> "was guilty of fraud, misrepresentation, or
> "deceit, or of some other wrong of equal
> "force in vitiating the contract, the circum-
> "stance that the contract has been fully and
> "voluntarily performed before discovery of
> "the facts giving rise to the right of rescis-
> "sion, will not operate to prevent the court
> "from granting relief; under such circum-
> "stances the right to rescind is none the less
> "available after full performance of the con-
> "tract than before; provided, of course, that
> "the other party seeking relief has not by
> "his conduct waived the right, that the other
> "party can be put *in statu quo*, and that no
> "adverse rights of third persons have inter-
> "vened."

Bigelow on Fraud (p. 430) says:

> "Indeed the fact that parties cannot be put
> "precisely *in statu quo* in regard to the sub-
> "ject-matter of the transaction will not be a
> "valid ground of objection to rescission. If
> "it were, *an executed contract could never be*
> "*rescinded*, for the parties never could be
> "placed thus in regard to time or in regard
> "to the use of the property. Some period of
> "time must elapse before rescission is pos-

"sible, and same use of the property will "generally be necessary to a discovery of the "wrong. All that can be required in a case "of an executed contract is that the injured "party should restore whatever of value has "been received and *so far as the nature of "things will permit* undo what has been "done."

V.—The cases are too numerous to require citation in which executed contracts for the sale or purchase of property, such as stock interests, merchandise, real estate, etc., have been rescinded on the ground of fraud, and judgment rendered for the moneys paid on return of the consideration received. The case of *Pence* vs. *Langdon* (99 U. S., 578), is an instance of this. Just as in this case, the fraud consisted in one individual taking advantage of his relation to another to sell his own stock in a mine, concealing the fact of his ownership. In that case both of the parties treated the contract as fully executed, and it was not until the vendee of the stock visited the mine at the invitation of the vendor after the stock had been sold and paid for, that the fraud was discovered, whereupon the vendee immediately gave notice of rescission and demanded the return of the amount paid. The case is in many respects similar to ours and is a direct authority to the effect that where fraud is established, whether in equity for a rescission, or in a common law action founded on prior rescission, the Court will in the one case grant relief, and in the other give judgment for a return of the amount paid.

Carr v. *National Bank & Loan Co.*, 167 N. Y., 375; *aff'd on writ of error*, 189 U. S., 426.

Turner v. *Ward*, 154 U. S., 618.

Burton v. *Driggs*, 20 Wall, 125.

Smith vs. *Richards*, 13 Pet.. 26.

Canadian Co. vs. *Assets Co.*, 165 App. Div., 96 N. Y.

VI.—All the authorities and text books proceed upon the theory that a fully executed contract may be rescinded for fraud, conditioned only upon the fraud being clearly proved, and upon the defrauded party doing everything in his power to put the wrongdoer *in statu quo*. Fraud, when proved, vitiates every transaction, and the remedy by rescission was particularly designed, and is especially appropriate, to annul executed contracts. It may not be possible, notwithstanding fraud is established, to put the wrongdoer completely *in statu quo*, but that this is not a valid objection is well stated in the passage above quoted from Bigelow on Fraud.

In *Neblett* v. *Macfarland* (92 U. S., 101, at p. 103) this Court said:

> "The Court proceeds on the principle, that, "as the transaction ought never to have taken "place, the parties are to be placed *as far as* "*possible* in the situation in which they would "have stood if there had never been any such "transaction."

FIFTH: THE OPINION OF THE CIRCUIT COURT OF APPEALS THAT IF THE SYNDICATE SUBSCRIBERS HAVE ANY RIGHT OF RESCISSION IT MUST BE WORKED OUT THROUGH THE PURCHASING COMPANY, IS NOT LEGALLY SOUND.

Specification of Error No. 9.

I.—The language of the Court is:

> "If the syndicate subscribers have any "right of rescission that right must be "worked out through the purchasing com- "pany. Moreover we do not see how even "it upon rescission could restore the defend- "ant to its original position. It may well

" happen that because of the peculiar position
" of any particular case no right of rescission
" exists in favor of one who has been led by
" fraud into a complicated agreement which
" has been fully executed. We think this
" such a case. On the other hand any profit
" made by the defendant or any damage
" sustained by the purchasing company as a
" result of this particular fraud, may be
" recovered by it."

II. —Whenever there is the slighest pretext to do so, the point is always raised by the doer of the fraud that the defrauded party has no individual right to enforce, and that whatever right there is must be enforced through the medium of the corporation. Whether rights of subscribers or shareholders must be enforced through the corporation depends on whether the injury is one which affects the *corporate property;* in which case the corporation would be the proper complainant. If, however, it affects the personal rights of individual subscribers, or shareholders, they are entitled to sue individually.

Dewing vs. *Perdicaries* (96 U. S., 193, at p. 196).
Hanchett vs. *Blair* (100 Fed., 817, at p. 824).
Morawetz on Corporations (Secs. 236*a*, 237, 292, 565-7)

Old Dominion Co. vs. *Lewisohn*, 210 U. S., 216.
Davis vs. *Las Ovas Co.*, 227 U. S., 80.
Yeiser vs. *U. S. Paper Co.*, 107 Fed., 340.

III.—Here there is no question of injury to *corporate property* at all. The wrong was not done to the Sheffield Coal and Iron Co. but the syndicate subscribers, who subscribed in ignorance of the fact that Edenborn was majority owner of and controlled the United States Iron Company, was purchaser as well as seller, and did not intend to pay his subscription in cash but in stock. The United States Iron Co., in which defendant was the majority owner, and the

purchase of which was the express object of the syndicate agreement, never went out of existence, but, as the complaint alleges (p. 40, fol. 113) and the Referee finds (p. 756, fol. 2668) there was a mere change of name from United States Iron Company to Sheffield Coal & Iron Company, with the stock increased from $1,000,000. to $2,500,000. Defendant's fraud worked a substantial advantage, rather than an injury, to the company, by putting into its treasury the syndicate subscriptions.

IV.—The fraud was not on the corporation, affecting the corporate property, nor on the syndicate subscribers collectively, but was a direct personal wrong on those individual subscribers who made and paid their subscriptions in ignorance of defendant's controlling interest in the United States Iron Company, and of his plan to sell his own property to the syndicate, and pay his subscription, payable in dollars, by transferring to the syndicate his stock in the United States Iron Company.

V.—The principal beneficiary of this transaction was defendant. He owned more than five-ninths of the capital stock of the United States Iron Company, and with Elwood and the Williams estate owned almost eight-ninths of the shares issued. Edenborn, Elwood and the Williams estate were in control of the United States Iron Company, and were parties to and beneficiaries of the fraudulent scheme conceived, prepared, promoted and carried through by defendant to induce subscriptions to be used to resuscitate, for their benefit, the United States Iron Company, with the result, as the complaint alleges (p. 40, fol. 120) and the Referee finds, that the Sheffield Coal & Iron Company became insolvent, went into the hands of a receiver, and the stock issued to plaintiffs and their assignors in pay-

ment of their subscriptions became worthless (p. 557, fol. 221).

VI.—The question does not depend upon whether the subscribers are many or few, or whether all of them have been defrauded or not, nor does it depend upon the extent of the fraud perpetrated—whether great or small. The suggestion in the opinion of the Court that "the result of the decision in the New York Court of Appeals would make a manager in a case like this who had sold his own property to a syndicate for $1,000. without disclosing his personal interest, liable for the loss resulting from failure of the entire operation—perhaps $2,500,000." is specious, but not sound. In the first place, we have no such case but, rather, a case where defendant's subscription amounted to one-fifth and, adding to it the stock interest of Elwood and the Williams estate, approaches one-half of the entire amount subscribed. In the second place, if the amount of property transferred by a syndicate manager was infinitesimal compared with the total amount subscribed, it might be proper to take into consideration whether the amount transferred was not so trifling that the subscriber could not have been influenced by the fact, but, in any case, a syndicate manager who takes advantage of his position to dispose of his own property to the syndicate, concealing the fact, is plainly guilty of fraud; and be the property large or small there will be danger in relaxing the rule to any extent. Where shall the line be drawn? But, it is not necessary to consider these matters, because defendant's fraud in concealing his ownership in and control of the United States Iron Company, and the transfer of his own stock in payment of his subscription was so large a proportion of the enterprise—one-fifth of the whole $2,500,000.—that good faith demanded full and fair disclosure of the facts. Concealment worked seri-

ous injury, it being proved and found that the plaintiff and his associates relied upon that full and fair disclosure by defendant which he admits it was his duty to make, and did not make.

SIXTH: HECKSCHER *v.* EDENBORN (203 N.Y., 210) IS A WELL SUPPORTED ADJUDICATION AGAINST EDENBORN IN AN ACTION INVOLVING THIS VERY SYNDICATE AGREEMENT, THAT THE SYNDICATE SUBSCRIBERS WHO MADE AND PAID THEIR SUBSCRIPTIONS HAVING NO KNOWLEDGE OR INFORMATION OF EDENBORN'S MAJORITY OWNERSHIP IN, AND CONTROL OF, THE UNITED STATES IRON COMPANY, AND THAT HE DID NOT INTEND TO PAY HIS SUBSCRIPTION OF $500,000 IN CASH BUT IN STOCK, AND THAT AS AGENT AND ATTORNEY OF THE SUBSCRIBERS HE WAS ENGAGED IN PURCHASING FROM HIMSELF HIS OWN PROPERTY, ARE ENTITLED TO RECOVER.

Specification of Errors Nos. 1 and 2.

I.—That case holds that he occupied a fiduciary relation to the subscribers to said agreement. And the Referee so finds (p. 765, fols. 2292-3).

(1) The opinion of the Court says:

> "He did not occupy the position of an "ordinary vendor but he was inviting others "to confer upon him a fiduciary relation-"ship" (p. 222).

(2) This accords with the universal rule upon that subject.

Dickerman v. *Northern Trust Company* (176 U. S., 181 at p. 203);
Yeiser v. *United States B. & P. Company* (107 Fed., 340);
Brewster v. *Hatch* (122 N. Y., 349).

II.—It needs no argument to show that an agent and attorney occupies a fiduciary relation to his principal, and the Referee has found, *as requested by counsel for Edenborn*, that he was the agent and attorney of each subscriber to the Syndicate agreement (p. 721, fol. 2162).

III.—The burden was upon Edenborn to show that before the plaintiff and his assignors subscribed the Syndicate agreement appointing him their agent to purchase the United States Iron Company, he made a full and fair disclosure of his interest therein.

(1) In the *Heckscher* case, the opinion says:

> " When he (Edenborn) solicited plaintiff's
> " assignors to become partes to the Syndicate
> " and appoint him one of their agents under
> " the circumstances referred to, he must be
> " held to have represented that he was legally
> " qualified to discharge the powers which
> " were being conferred upon him and the ob-
> " ligation affirmatively rested upon him to
> " inform them of his interest in the property
> " which he was securing authority to buy, if
> " he would hold them to their contract and
> " avoid the imputation of legal misconduct
> " which the law fastens on an agent who at-
> " tempts to serve the interests of both the
> " principal and himself " (p. 22).

IV.—But we need not rely upon rules of law, for the defendant admits in his answer, by not denying the allegation, that

> " It was his duty to make to said subscribers
> " full disclosure of all facts and circumstances
> " which were within defendant's knowledge,
> " which said subscribers ought to have known
> " in order to enable them to form an inde-
> " pendent judgment and protect their inter-
> " ests " (fol. 14).

V.—The Referee finds as a matter of fact as well as a conclusion of law (pp. 117–8, fols. 351–354), that

Eden born's duty was to make full and complete disclosure of his interest in the United States Iron Company, of his stockholding therein and of any other interest which he had in such company and in the proposed scheme provided for in the Syndicate agreement, and to give to the said subscribers and each of them as full information as defendant possessed in relation to said subscriptions, and of any facts which would affect their interests or the interest of any or either of them, and that he failed and omitted to make such disclosure.

(1) In the *Heckscher* case the Court uses this language:

> " The principle that a person occupying a " position of agent to purchase may not sell " his own property to his principal is so ele- " mentary that it need only be stated. It " must be quite as elementary and true that, " if one by misrepresentation or suppression " of facts when he ought to speak, induces " another ignorantly to make a contract ap- " pointing the first his agent to buy and " conferring upon him discretionary power " to purchase his own property, the contract " is voidable and, even if executed, may be " rescinded and the money recovered back on " restoration of what has been received."
>
> " The defendant comes within these prin- " ciples. When he solicited plaintiff's assignors " to become parties to the Syndicate and ap- " point him one of their agents under the cir- " cumstances referred to, he must be held to " have represented that he was legally quali- " fied to discharge the powers which were " being conferred upon and the obligation af- " firmatively rested upon him to inform them " of his interest in the property which he was " securing authority to buy if he would hold " them to their contract and avoid that impu- " tation of legal misconduct which the law " fastens on an agent who attempts to serve " the interests of both the principal and him- " self."

"He did not occupy the position of an ordinary vendor, but he was inviting others to confer upon him a fiduciary relationship. If he knew and they were ignorant of the same fact which attacked the very substance of that relationship and legally destroyed his ability to meet its full requirements, it was his duty to advise them of it and for his failure so to do they were entitled to repudiate the agreement and avoid what had been done under it."

VI.—There is no pretense that Edenborn ever informed the plaintiff or his assignors of the following facts:

1. That he owned a controlling interest in the United States Iron Company which he intended to sell to the syndicate (p. 117, fol. 349).

2. That he did not intend to pay his subscription of $500,000 "in dollars," as called for by the syndicate agreement, but largely by the transfer of his stock interest in said company (p. 753, fol. 2259).

3. That Elwood, who owned 2,201 shares of stock in the United States Iron Company (p. 753, fol. 2257), did not intend to pay his subscription of $300,000 "in dollars" as called for by the syndicate agreement but largely by the transfer of his stock interest in said company (Finding 19, fols. 2260–1).

4. That the estate of E. P. Williams, which was the owner of 518 shares of the capital stock of the United States Iron Company, did not intend to pay its subscription of $51,800 "in dollars," as provided by the syndicate agreement but by the transfer of their stock interest in said company (p. 755, fol. 2263). These

three—Edenborn, Elwood and the Williams Estate—owned 8,084 out of the 9,250 shares of issued stock of the U. S. I. Co. (p. 718, fol. 2152; p. 753, fols. 2256–7; p. 755, fols. 2263–4).

VII.—If Edenborn had intended to inform the plaintiff and his assignors that he owned the controlling interest in the United States Iron Company how simple it would have been for him to have stated this fact in the syndicate agreement, and if neither he nor Elwood nor the Williams estate intended to pay their subscriptions "in dollars" but in their stock in the United States Iron Company how important it was that Edenborn should have disclosed this fact. It would have made the greatest possible difference to the plaintiff and his assignors if they had known that Edenborn, Elwood and the Williams estate only intended to turn in stock for their subscriptions while they were paying actual cash. This concealment was fraud.

Tyler v. *Savage*, 143 U. S., 79, at p. 98.

VIII.—The Referee, in his opinion, says:

> "Each of the subscribers who were represented in this action have testified that they knew nothing of the ownership by the defendant of the capital stock of the United States Iron Company. On the contrary they testified that they had no information at the time of making the subscription that the defendant was the owner of stock in the United States Iron Company and did not learn of such fact until the Heckscher action was tried. This testimony is practically uncontradicted and must be taken as true in every substantial aspect. The defendant does not claim that he, at any time made disclosure to any of the subscribers to the syndicate agreement of his ownership of the shares in the United States Iron Company."

IX.—Edenborn obtained the money from Sim and his assignors by false pretense:

1. That nothing existed to disqualify him from acting as their agent in purchasing with their money the property named in the paper.

2. That he was qualified to act impartially and unselfishly, and in their own interest alone.

3. That he had no interest that was hostile to theirs.

4. That he was subscribing $500,000 "*in dollars;*" that Elwood was subscribing $300,000 "*in dollars;*" that the estate of Williams was subscribing $51,800 "*in dollars,*" that is to say, in cash, whereas it was found by the Referee:

> "That at no time did defendant intend to "pay his subscription to said Syndicate ex- "cept by putting in his stock in the United "States Iron Co., and whatever cash was "needed in addition to make the full amount "of his subscription," and "that in part "payment of his subscription, said defend- "ant transferred his said 5,365 shares of "stock in said United States Iron Company "to said Syndicate at $70.00 per share" (p. 753, fol. 2259); as to Elwood and the Williams estate (pp 753–5, fols. 2259–2264).

5. He obtained their money by suppressing the fact that he was obtaining an appointment from them to act for them in a transaction in which he, as their agent, would deal with himself.

X.—Plaintiff and his assignors had implicit faith in Edenborn. They blindly trusted him (see Referee's Findings (p. 751, fols. 2252–3; p. 764, fols. 2292–3). Their signatures to the paper making Edenborn their

agent and agreeing to entrust their money to him were obtained by false pretenses.

XI.—The paper making him their agent, and everything that was done thereafter rested on a false foundation, to wit: Edenborn's ability in each and every instance, not only in one transaction but in every transaction, to act for them as their faithful agent and trustee in purchasing property with their money.

XII.—Sim and his assignors entrusted their money to Edenborn to invest for them because they had signed the paper constituting him their agent upon his representation that he had subscribed $500,000 payable in dollars. If he had not succeeded in inducing them to sign the paper constituting him their agent, and relying on his subscription, they would not have entrusted their money to him. Everything that was done, was done because Edenborn had induced them or allowed them to appoint him their agent, without disclosing his adverse interest in the transaction, and that he did not intend to pay his subscription in cash but largely in stock. It was all a part of the transaction constituting Edenborn the agent of each of them.

XIII.—The paper contemplated that the "Syndicate Managers" should, if they deemed proper, buy coal lands, coke ovens and blast furnaces, to be used in connection with the United States Iron Company property, which was an iron property. The United States Iron Company was the basic property of the entire enterprise. They were to buy coal lands, coke ovens and blast furnaces to round out the situation. If Edenborn's own property had not gone in there would have been no occasion to buy the other property, which was merely the fringe on the garment.

XIV.—The courts, in the cases to which we shall refer, have said that the conduct of an agent in acting for himself and his principal in the same transaction "is poisonous in its consequences," and that the transaction itself "is to be destroyed in every instance."

XV.—We respectfully commend to the consideration of the Court as confirming the above quotation from the case of *Heckscher* v. *Edenborn* (203 N. Y., 210), the language of Mr. Justice Lurton in *United States* v. *Carter* (217 U. S., 286, at the foot of page 305, and at pp. 306-9), and the following cases:

Michoud v. *Girod* (4 How., 593).
In re Frazin and Oppenheim (181 Fed., 307, at p. 309).
Brookes v. *Martin* (2 Wall, 70).
Wadsworth v. *Adams*, (138 U. S., 380, at p. 388).
Glover v. *Ames* (8 Fed., 351).
Crystie v. *Foster* (61 Fed., 551).
McKenly v. *Williams* (74 Fed., 94).
Alger v. *Anderson* (78 Fed., 729).
Mastin v. *Noble* (157 Fed., 506).
Byrne v. *Jones* (159 Fed., 321).

XVI.—Plaintiff and his assignors owed no duty to investigate to ascertain whether defendant was committing fraud. They were not dealing at arm's-length. Defendant occupied a relation of trust and confidence. There was nothing to arouse suspicion. As attorney and agent of plaintiff and his assignors he took advantage of his position to commit the fraud complained of. Under these circumstances plaintiff and his assignors owed no duty to investigate.

Upton v. *Inglehart*, 3 Dillon, 496.
Mead v. *Bunn*, 32 N. Y., 275.

Baker v. *Lever*, 67 N. Y., 304.
Directors v. *Kisch*, L. R., 2 H. L., 99.
Enderly v. *Johns*, 120 Ill., 469.
Cleveland v. *Richardson*, 132 U. S., 318 (which notes the distinction where there is a relation of trust and confidence).
Shappiro v. *Goldberg*, 192 U. S., 232 (which refers to *Mead* v. *Bunn* (*supra*).

XVII.—The Referee, it is true, acquits defendant of any intent to deceive and defraud, and he did so evidently because the motive or intent is wholly immaterial.

In the *Heckscher* case (203 N. Y., 210, at p. 19) it is said:

> " *I do not find any evidence that the defend-*
> " *ant was guilty of that active fraud* dis-
> " closed in many cases where consciousless
> " promotors have accumulated property at a
> " low price under a well devised scheme to
> " unload it upon others at a high price. There
> " is nothing to indicate that the defendant
> " acquired his stock in the United States Iron
> " Company for any such purpose or that the
> " stock purchased by him and his associate
> " managers in that Company was not fairly
> " worth the price paid for it which was
> " 30.00. per share less than the price fixed in
> " the Syndicate agreement. But broadly
> " speaking the plaintiffs must rest their claim
> " to relief on the basic principle that defend-
> " ant induced them ignorantly to execute an
> " agreement which violated the rule that an
> " agent to buy may not purchase of himself."

XVIII.—It is the universal rule not only that the agent must make a full and fair disclosure of all the facts and circumstances within his knowledge in any way calculated to enable the principal to

judge of the propriety of the same, but when it is questioned by the principal, the burden is upon the agent of proving affirmatively that he dealt fairly, and in the strictest good faith imparted to his principal all the information possessed by him concerning the property.

Am. and Eng. Ency. Title Agency, Vol. 1, p. 1081.

Cyc. of Law, Title Principal and Agent, Vol. 31, pp. 1431-1440.

XIX.—Therefore it is entirely immaterial whether or not the defendant *intentionally* concealed his interest in the United States Iron Company or his ownership of its stock from the plaintiff or his assignors or any other facts. If the defendant refers to the findings of the Referee on this subject embodied in his requests to find we reply that he may not have *intended* to conceal but the fact is that he *did* conceal. It might just as well have been found he intended to disclose but did not disclose. If it was his duty as he admits it was to disclose, it is no answer to his failure to disclose that he intended to disclose but unintentionally did not do it, or that he did not intend to conceal but unintentionally did conceal.

> "In *Heckscher* v. *Edenborn* the Court say: "the conclusion has been reached that so far "as it authorized the purchase of defendant's "property, it was constructively fraudulent "*even though there were no actual fraudulent* "*motive on his part*" (Britton *v.* Ferris, 171 N. Y., 235).

XX.—In connection with *National Bank* vs. *Petrie* (189 U. S., 423), was decided the case of *National Bank* vs. *Carr* (189 U. S., 426), an action on a rescission of a transaction in which bonds belonging to the bank were sold and delivered to the plaintiff

below. The cases were on writs of error to the Court of Appeals and to the Supreme Court of the State of New York. The judgments below were affirmed.

Mr. Justice Holmes said:

> "This case is similar in substance pleading
> " an argument to the foregoing with the ad-
> " ditional fact that the president of the bank
> " acted as the confidential adviser of the de-
> " fendant in error, and did not reveal to her
> " that the bonds belonged to the bank or that
> " he was on both sides of the transaction in-
> " terested against her. As soon as she found
> " out that the bank was the seller she repu-
> " diated the sale." Judgment affirmed.

The Court of Appeals said in the same case (*Carr* v. *National Bank*, 167 N. Y., 375):

> " The appellant argues that the facts did
> " not establish any actual fraud on the part
> " of the defendant, but that was not essential
> " to the granting of the relief which plaintiff
> " demanded. There was shown to have been
> " such a condition of things in the situation of
> " the parties and the ignorance in which the
> " plaintiff was kept of material facts by ways
> " of suppression or of misrepresentation as in
> " equity to warrant her in wholly repudiating
> " the transaction. *It is quite immaterial that*
> " *there may have been no intention to actually*
> " *defraud* (Hammond *v.* Pennock, 61 N. Y.,
> " 145)."

XXI.—The following is from the opinion in *Robertson* vs. *Chapman* (152 U. S., 673, at p. 681), which involved a transaction where it was claimed that an agent to sell effected a sale to himself.

> "The law will not in such a case impose
> " upon the principal the burden of proving
> " that he was in fact injured, *and will only*

" *inquire whether the agent has been unfaith-*
" *ful in the discharge of his duty.* While his
" agency continues he must act in the matter
" of such agency solely with reference to the
" interests of his principal. The law will not
" permit him without the knowledge or assent
" of his principal to occupy a position in which
" he will be tempted not to do the best he may
" for the principal."

Mastin v. *Noble*, 157 Fed., 506, 509.
Marye v. *Strouse*, 5 Fed., 483.
Conkey v. *Bond*, 36 N. Y., 427.

XXII.—It follows, therefore, that where one has himself appointed agent to purchase certain property if he sees fit, without disclosing that it is his own property that he is having himself appointed agent to purchase, the appointment, and, in fact, the entire transaction, must be declared by the courts to be void *ab initio* at the instance of the principal, irrespective of fraudulent intent.

Pence vs. *Langdon*, 99 U. S., 578.
Downey vs. *Finucane*, 205 N. Y., 250.
Mack vs. *Latta*, 178 N. Y., 525 (which holds that a recovery may be had of a defendant although he received no benefit from the transaction).
Morgan vs. *Skiddy*, 62 N. Y., 319.
Directors vs. *Kisch*, L. R., 2 H. L., 113.
Hornblower vs. *Crandall*, 7 Mo. App., 220. Aff. 72 Mo., 581.
Franey vs. *Warner*, 96 Wis., 222.
Hebgen vs. *Koeffler*, 97 Wis., 313.

SEVENTH: THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS SHOULD BE REVERSED, AND THAT OF THE DISTRICT COURT ENTERED UPON THE REPORT OF THE REFEREE SHOULD BE AFFIRMED.

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Supreme Court of the United States,

OCTOBER TERM, 1914.

No. [redacted] 218

JAMES SIM,

Petitioner,

against

WILLIAM EDENBORN,

Respondent.

No. 262. [redacted] 9

THOMAS P. ALDER,

Petitioner,

against

WILLIAM EDENBORN,

Respondent.

BRIEF IN REPLY FOR PETITIONERS.

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Supreme Court of the United States.

OCTOBER TERM, 1914.

JAMES SIM, Petitioner, AGAINST WILLIAM EDENBORN, Respondent.	No. 261.
THOMAS P. ALDER, Petitioner, AGAINST WILLIAM EDENBORN, Respondent.	No. 262.

BRIEF IN REPLY FOR PETITIONERS.

POINTS.

FIRST:—RESPONDENT'S BRIEF DOES NOT DISPUTE THE CORRECTNESS OF OUR FIRST POINT THAT PROPER DEFERENCE AND RESPECT FOR THE NEW YORK COURT OF APPEALS SHOULD HAVE LED THE CIRCUIT COURT OF APPEALS TO LEAN TOWARD FOLLOWING THE DECISION IN *Hecksher* VS. *Edenborn*.

I.—In view of this decision, which was before the Circuit Court of Appeals, it is difficult to explain the

omission to notice and apply said rule on any other theory than that of inadvertence. These cases were peculiarly appropriate for its application because the Circuit Court of Appeals regarded them as "balanced with doubt", stating in its opinion that "where Judges have differed as much as they have in this case, no conclusion can be reached with confidence." Respondent's counsel does not claim that the cases were free from doubt, but apparently acquiesces in the doubt expressed by the Circuit Court of Appeals.

II.—Every point urged by respondent was presented to and considered by the New York Court of Appeals in *Hecksher* vs. *Edenborn*. That Court unanimously reached the conclusion that these points were not well taken. Notwithstanding this the Circuit Court of Appeals rejected the decision in *Hecksher* vs. *Edenborn*, which the Referee followed, and reversed the judgments.

III.—We take the liberty of referring to the petitions and brief on our motions for writs of *certiorari*, which show that the writs were applied for chiefly on the ground that the Circuit Court of Appeals should have applied this rule and followed the decision of the New York Court of Appeals. The facts and law upon this subject are there fully presented. Public interest in uniformity of decisions in the courts, and the necessity of avoiding conflict between Federal and State courts, make it important that the rule should be enforced. We submit that plainer cases than these for its enforcement could scarcely be presented.

SECOND:—RESPONDENT DOES NOT DISPUTE OUR SECOND POINT, VIZ.: THAT IF HE WAS NOT PUT *in statu quo* HIS OWN WRONGDOING PREVENTED IT, AND HE SHOULD BEAR THE CONSEQUENCES.

I.—Respondent's brief endeavors to present respondent as innocent of wrongdoing, as acting in good faith, and not attempting to deceive or defraud, but this effort is not borne out by the facts found and is contrary to the Referee's finding. The complaint alleged that it was defendant's duty to make adequate, full and complete disclosure of his ownership of stock in the United States Iron Company and of his interest therein and of any other facts which affected the interest of the subscribers to the syndicate agreement (Record, p. 5, fol. 14). The answer did not deny this duty, and the Referee found as alleged in the complaint. He also found that respondent failed and omitted to make such disclosure and that his failure so to do operated in law as a fraud (Record, p. 119, fol. 355). We have shown in our brief that it was unnecessary to a decision of the case that the Referee should find a fraudulent *intent*, or anything more than the non-disclosure and concealment, which he did find, to support the judgment he rendered, and which the Circuit Court of Appeals held did support it.

II.—Upon the question of good faith, false statements, misrepresentations, fraudulent suppression of material facts and of deceit and fraud, the Referee was requested by respondent to find their absence and refused to find that respondent's acts were in good faith (Record, p. 718, fol. 2154), or that he made no false statements or representations (Record, p. 719, fol. 2155; p. 727, fol. 2179; p. 729, fol. 2185; p. 730, fol. 2189), or did not deceive or defraud (Record, p. 736, fol. 2206), or made no misrepresentations and committed no fraud (Record, p.

738, fol. 2215; p. 739, fol. 2216; p. 744, fol. 2280), or was guilty of no fraudulent suppression of material facts (Record, p. 745, fol. 2235; p. 746, fols. 2236, 8 and 9). Far from exonerating him from wrongdoing in these respects he declined to exonerate him.

III.—With respect to restoring the *status quo*, respondent's argument is founded on obstacles to a complete rescission, which were created by and arose out of his wrongful acts in connection with procuring subscriptions to the agreement as prepared by him, and consummated under his management. The Referee finds that he conceived the scheme; was its promoter; embodied it in the syndicate agreement; invited subscriptions to it; had himself appointed agent and attorney of the subscribers under it; and undertook to direct and manage it as agent and attorney of the subscribers with power to carry out the agreement, which had as its prime object the purchase by him as agent for the syndicate from himself his own stock in the United States Iron Company (see p. 6 of Petitioner's Brief). It is evident, therefore, that the form and substance of the syndicate agreement and everything done under and in execution of it was under his management and control. It necessarily follows that the obstacles and complications in the agreement or which arose in executing it were created by him. He alone was responsible for them and is in no position to urge that because of them he was not and could not be placed in *statu quo*.

IV.—With respect to the decision in the case of *Getty* vs. *Devlin* (54 N. Y. 20), that case is dealt with and distinguished by Judge Hiscock in his opinion in *Hecksher* vs. *Edenborn*, and its inapplicability pointed out.

V.—We can hardly suppose that respondent's counsel intends under his First Point to urge that the petitioners knew of respondent's ownership of stock in the United States Iron Company, but, however this may be, it is only necessary to call attention to the Referee's finding (p. 117, fol. 350) as follows:

> "The said subscribers to the syndicate agreement and each of them * * * had no knowledge of the defendant's ownership of the said shares in the United States Iron Company or of his being possessed of any pecuniary interest therein or of any interest therein, and the said subscribers made their subscriptions and each of them in ignorance of the fact of defendant's ownership in said stock and of his interest in said United States Iron Company."

THIRD:—RESPONDENT'S ARGUMENT BASED ON THE AGREEMENT ITSELF AND THE ACTS IN EXECUTING IT FAILS TO ATTACH DUE WEIGHT TO DEFENDANT'S FRAUD AT THE VERY BEGINNING IN OBTAINING SUBSCRIPTIONS BY FRAUDULENT CONCEALMENT OF MATERIAL FACTS.

I.—This is the subject matter of our complaint. The agreement declares at the outset that "whereas an opportunity is afforded for acquiring the stock of the United States Iron Company at par", etc.; its main purpose and object was to avail itself of this opportunity. Behind the syndicate agreement we discover respondent as the dominant and chiefly interested figure. When he had himself appointed agent and attorney of the subscribers to the agreement to purchase the stock of the United States Iron Company at par, his first step in committing the fraud was to conceal the fact that he was the majority stockholder, and was having himself appointed agent and attorney to buy

from himself his own property; the next was to make, and permit Elwood to make fictitious subscriptions, payable in cash, holding out as an inducement that he had subscribed $500,000. and Elwood $300,000. payable in dollars (p. 109, fol. 325), which the Referee finds neither he nor Elwood intended to pay in cash (p. 753, fol. 2259).

His object was nothing more or less than to empower himself to buy from himself his own property and induce subscriptions upon the representation that he, Elwood and Williams had subscribed $851,800. in cash, which neither of them intended to pay in cash, but almost entirely in stock of the United States Iron Company, and by so doing unload upon the syndicate subscribers stock of the United States Iron Company, and secure to himself the benefit of their cash subscriptions.

II.—It is of no consequence what was done subsequently, the material fact being that the fraud was consummated. It is also of no consequence whatever what part his co-syndicate managers had in the transaction. Although it seems scarcely possible that at the outset they did not know respondent's purpose, the time came when they did know. At all times they owed a duty to the syndicate subscribers, for whom they were acting as agents, and when it came to their knowledge that he was engaged in selling to the syndicate his own property, it was their duty, under penalty of participating in his fraud, to repudiate the transaction. Not having repudiated it, they became equally guilty with him. They lent themselves to respondent's fraudulent scheme. Neither of them was called as a witness; neither offered an explanation; it was the respondent's duty to call them if they could exonerate him and themselves, and every presumption is that they could not, and that their testimony, if it had been

forthcoming, would have been adverse. They were, however, mere figure heads for the respondent who, as the Referee finds, was the promoter and manager of the syndicate, and personally received the syndicate subscriptions (p. 756, fols. 2268-9).

III.—The New York Court of Appeals properly characterized respondent's conduct as fraudulent. That Court looked behind the transaction; stripped it of extraneous surroundings, and found behind it respondent, conceiving and executing a scheme founded in fraud. That Court therefore applied a well-recognized remedy and held that the petitioners were entitled to rescind and call upon respondent to return the amount paid upon restoring, as far as possible, what had been received.

IV.—The case considered on principle is similar to those where subscriptions are cancelled, or where subscribers defend actions on subscriptions, on the ground of fraud. As in such cases fraud relieves subscribers from subscriptions before the subscriptions have been paid, so in the present case a subscriber is entitled, after payment of his subscription, to demand repayment on the ground that the subscription was vitiated and a nullity, having been obtained by fraud.

V.—Respondent argues as to the serious consequences to him in being compelled, as incorrectly said, to "buy back" the subscribers stock. The expression is fallacious and misleading. With the consequences, the courts are not concerned. It is well said in *Masson* vs. *Bovet* (1 Denio, 69), "the law cares very little what his, the wrongdoer's, loss may be, and exacts nothing for his sake."

VI.—Respondent's counsel argues as if both parties stood upon an equal footing, which is incorrect.

There was a relation of trust and confidence. The respondent owed an affirmative duty to be open and above board, and that his conduct should be just, fair and free from suspicion. The burden of proof was upon him to satisfy the Court in this respect, and in this he failed.

VII.—All through the transaction respondent's interest was a stock interest. He did not part with this, as the result of the transaction was to turn over his stock, and an amount of cash, to the Sheffield Coal and Iron Company, which was the United States Iron Company with its name changed. In return he received certificates of stock in the Sheffield Coal and Iron Company. Just as he received certificates of stock in the Sheffield Coal and Iron Company as representing his interest, so the syndicate subscribers received like certificates representing their interest. When respondent's fraud upon the syndicate subscribers was discovered they restored to him the stock which they received as representing their interest, and thus gave him back everything they had acquired.

VIII.—Respondent's counsel argues as if it were necessary for the subscribers to undo the entire syndicate agreement, and what had been done under it, as preliminary to relief. This error arises from a failure to distinguish between undoing a subscription to the syndicate agreement and undoing what is done under the syndicate agreement. Just as a suit to cancel a subscription and remove the name of the subscriber, or the defense to an action upon a subscription on the ground of fraud leaves subscription agreemeuts in force and effect as against non-defrauded subscribers, so in these cases rescission of a syndicate subscription on the ground of fraud, and a demand of repayment from the perpetrator of the fraud, leaves the syndicate agreement

in force as against non-defrauded subscribers. No case is cited by respondent's counsel and none can be found, we believe, which requires in such cases that the defrauded party must, before he can avail himself of the remedy of rescission for fraud, undo all that has been done under the syndicate agreement itself. Rescission for fraud and demand of repayment is precisely the same in principle and effect as where subscriptions are cancelled or defenses are interposed to subscriptions on the ground of fraud, and restoration of the *status quo* is required "as far as possible" and not further.

FOURTH.—THERE ARE, IN FACT, BUT TWO QUESTIONS WHICH REQUIRE CONSIDERATION AND A DECISION OF EITHER OF THEM IN OUR FAVOR WILL LEAD TO A REVERSAL OF THE JUDGMENT.

I.—The first concerns the duty of the Circuit Court of Appeals to lean toward following the decision of the New York Court of Appeals in *Hecksher* vs. *Edenborn*.

II.—The second relates to the question whether the petitioners did as far as possible put the respondent *in statu quo*. We have sought to satisfy the Court that he was in fact put *in statu quo*, and that if he was not it was his own wrongdoing in complicating the transaction that prevented it.

III.—The Circuit Court of Appeals held that the respondent was guilty of constructive fraud, and that the subscriptions were capable of being rescinded on that ground, and that the facts found supported the judgment. Its decision was based upon the sole ground that the facts stated in the complaint did not show that he was placed *in statu*

quo. The facts found by the Referee follow the allegations of the complaint and if, as the Circuit Court of Appeals correctly held, the facts found support the judgment rendered, it follows that the facts set forth in the complaint supported the judgment.

IV.—Supplementing the discussion of this question in our main point, we respectfully call the attention of the Court to two points:

(1) It is not assigned as error that the facts stated in the complaint, nor (2) that the facts found by the Referee, did not support the judgment rendered.

V.—There are 224 assignments of errors and not one of them assigns error in either of these respects. Inasmuch as respondent was so minute in specifying errors as to specify 224 no special indulgence is called for in his omission to assign the errors upon which he now relies.

VI.—With respect to the first eight assignments of errors (pp. 787–9, fols. 2359–2365) they relate to the sufficiency of the complaint, with the exception of those dealing with an alleged defect of parties and an improper joinder of causes of action. They are of the most general character and specify nothing with particularity. This has been frequently held to be contrary to the office of an assignment of errors and to the rules laid down concerning them. To meet these points respondent's counsel calls attention to certain cases in this Court, but none of them have any bearing, as this question was not raised, while in the case of *Chicago* vs. *Clark* (178 U. S. 353) error was assigned that the findings did not support the judgment. This subject is considered by this Court in *Behn* vs. *Campbell* (205 U. S. 483), from which it appears that while errors not stated in the assignments of errors have sometimes

been considered, the limit of this practice is accurately stated in the 35th rule of the Court, and that errors not assigned will be disregarded except that the Court at its own option may notice a plain error not assigned, and that the Court will not be astute in selecting statements of law and subjecting them to minute scrutiny where, on the whole, it is clear that the facts found by the Court justify the judgment which it rendered.

VII.—If the assignment of such a multitude of errors is, as has been said, "a perversion of the rule," we submit that where counsel have taken pains to search the record for every conceivable error and assign it, the omission to assign with particularity what he claims is the principal error in the case and what he is pleased now to call "plain error not assigned" ought to prevent a consideration of such errors not assigned. The errors not assigned which he would have this Court consider are not, we believe, in any sense "plain errors"; they are, at most, doubtful and questionable errors and, in fact, not errors at all. We think that the Circuit Court of Appeals was not justified, in the absence of proper assignments of errors in the respects referred to, in disposing of the case upon errors not assigned.

Briscoe v. *District of Col.*, *221 U. S. 547.*
Pickett v. *U. S.*, *216 U. S. 456.*
Foster Fed. Pr., Vol. III, p. 2473.

VIII.—We submit that the judgments should be reversed.

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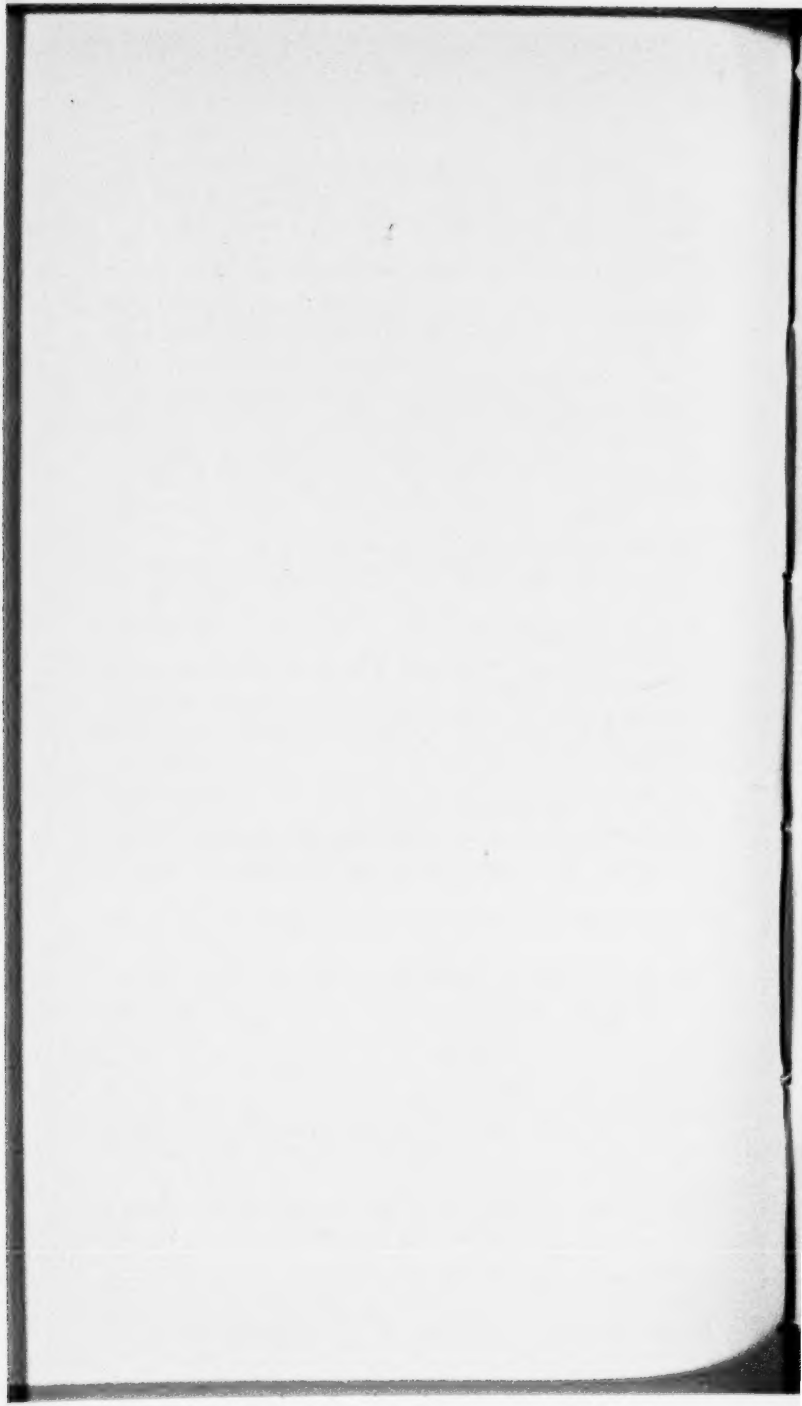

Supreme Court of the United States,

OCTOBER TERM, 1914.

No. 8.

JAMES SIM,
Petitioner,

vs.

WILLIAM EDENBORN,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

STATEMENT OF THE CASE.

This writ was granted to review a judgment of the United States Circuit Court of Appeals for the Second Circuit, reversing a judgment of the United States District Court for the Eastern District of New York in favor of plaintiff, entered upon the report of a Referee appointed under a written stipulation waiving a jury trial (pp. 113-4, fols. 338-402).

The action was founded upon a prior rescission for fraud to recover moneys paid by plaintiff, and three others, whose claims were assigned to plaintiff.

The action was originally brought in the State Court, but removed by defendant to the Circuit Court of the United States for the Eastern District

of New York, on the ground of diversity of citizenship (p. 24, fols. 70-72).

The causes of action were similar in their allegations, to wit: defendant in April, 1902, being the owner of 5,365 out of 9,254 shares of the United States Iron Company, prepared a syndicate agreement which expresses, as its prime object, that an opportunity is afforded to acquire for a cash consideration the ownership, control and possession of the United States Iron Company, at par, and for the consolidation of the United States Iron Company and other iron ore properties, and for other purposes, *appointing himself syndicate manager and agent and attorney of the subscribers,* to which agreement he invited subscriptions amounting to $2,500,000. Among those invited were plaintiff and his associates (p. 5, fol. 15, p. 116, fols. 347-8), each of whom made a subscription: Sim for $15,000; Cluff for $15,000; Coles for $20,000; Stone for $5,000 (fol. 348) and Alder for $10,000 (Alder record, p. 21, fol. 63, p. 60, fols. 178-9). The subscriptions were paid. Subsequently plaintiff and his assignors discovered defendant's concealment of his ownership in and control of the United States Iron Company; that he was acting as buyer and seller; that he with others did not intend to pay their subscriptions in cash, and had paid them to a large extent in stock of the United States Iron Company, whereupon they elected to rescind their subscriptions and gave notice of rescission offering to restore the stock they had received and demanding return of the money they had paid (p. 9, fol. 27, and p. 117, fol. 352).

The complaint alleged and the Referee found that a relation of trust and confidence existed between defendant and the subscribers, and that it was his duty to make to the subscribers full and complete disclosure of his interest in the United States Iron Company, of his stock holdings therein, and of any

other interest of his in such company, and in the proposed scheme provided for in the syndicate agreement, and to give to said subscribers and each of them as full information as he possessed relating to said subscriptions, and of any fact which would affect their interest or the interest of any or either of them (p. 5, fol. 14).

The complaint in its original form was demurred to for insufficiency, defective parties and improper joinder of causes of action (p. 25, fols. 75-7). This demurrer was sustained with leave to amend. The complaint was amended and a second demurrer was interposed on the same grounds, which was overruled, with leave to defendant to answer. A decision was signed, finding, first, that the complaint states facts sufficient to constitute a cause of action; second, that there is no defect of parties defendant, and, third, *that the complaint states a cause of action at common law based on the rescission of a contract alleged to have been procured by fraud* (p. 59, fol. 177). Judgment was entered overruling the demurrer (p. 60, fol. 180). No attempt was made by defendant to obtain a review of this decision and judgment, and an answer was served (p. 62, fol. 184).

The answer denied the allegations of the complaint, except the allegation that it was "defendant's duty to make to said subscribers full disclosure of all facts and circumstances within his knowledge, and which the subscribers ought to have known in order to enable them to form an independent judgment and to protect their interests (p. 65, fol. 194).

A copy of the syndicate agreement, with a list of subscriptions annexed to the answer, is referred to in the Referee's report as the Syndicate Agreement Exhibit No. 16 (p. 116, fol. 347).

By written stipulation between the parties a jury trial was waived and the issues of law and facts

were referred to a Referee to hear and determine the same (p. 113, fols. 337 to 342)

The Referee, in deciding in favor of the plaintiff, followed a decision of the Court of Appeals of the State of New York in *Hecksher* vs. *Edenborn* (203 N. Y., 210), involving the liability of Edenborn, the defendant in that case as well as in this, upon a cause of action founded upon the same syndicate agreement upon which this action is founded, brought by one of the subscribers thereto, precisely as this action is brought by another subscriber, both actions being founded on a prior rescission for fraud and supported by the same facts, the same judgment being rendered in each.

The Referee's report was filed and application being made to the court below upon notice to the defendant's attorney for the entry of judgment, defendant moved for a new trial, which was denied, and judgment was duly entered for the amount awarded by the Referee (p. 173, fols. 398, 402). The defendant *filed 224 assignments of error* (p. 783, fols. 2359-2548), and thereupon sued out a writ of error to the Circuit Court of Appeals for the Second Circuit (fols. 2-5).

That Court refused to follow the decision of the Court of Appeals of New York in *Hecksher* vs. *Edenborn,* and held upon a point not raised at the trial, nor assigned as error, as follows:

> "The Referee held that he was bound by "the decision of the District Judge fortified "by that of the Court of Appeals in Hecksher "*vs.* Edenborn, 203 N. Y., 210, holding that "the complaint stated a good cause of action "and that the only question before him was "whether fraud, actual or constructive, had "been established by the evidence; upon this "point he found that there was no actual fraud, "but that Edenborn being the agent of each "of the syndicate subscribers was bound to "disclose to each, that he was interested in one "of the properties to be purchased and was, as

"agent, selling his own property to the syn-
"dicate in payment of a part of his subscrip-
"tion. His failure to do this, was held to be
"a constructive fraud. He also found that
"the plaintiffs were not guilty of laches. Upon
"this writ of error, these findings are binding
'upon us and they support the judgment.
"(David Lupton Sons *vs.* Auto Club, 225 U. S.,
"489.) But we are authorized to re-examine
"the question whether the complaint states a
"cause of action. This is a question of law
"arising upon the face of the record and raises
"the question whether the facts found by the
"Referee support the judgment he entered.
"(Andes *vs.* Slauson, 130 U. S., 435.)" * * *

"Where judges have differed as much as
"they have in this case, no conclusion can
"be reached with confidence, but we arrive at
"that of the Appellate Division in Hecksher
"*vs.* Edenborn (131 App. Div., 253), especially
"for the reason expressed by Justice Miller
"at page 266."

Thus, the Circuit Court of Appeals, disregarding the decision of the Court of Appeals of New York, adopted an opinion—not a prevailing opinion—in the Appellate Division, which had been overruled by the New York Court of Appeals, and reversed the judgment.

This Court on plaintiff's petition granted a writ of *certiorari* to review the judgment of the Circuit Court of Appeals.

The facts set forth in the complaint and found by the Referee in his report are, dismissing unnecessary verbiage, as follows:

1. On April 5, 1902, defendant was the owner of 5,365 out of 9,250 shares of the United States Iron Company, and continued to be such until about December 30, 1902, when he transferred them to the Sheffield Coal & Iron Company (p. 116, fol. 346).

2. In 1902 he conceived a scheme to consolidate the United States Iron Company with other properties and, on or about April 5, 1902, prepared what has been named a Syndicate Agreement for the proposed consolidation, and invited subscriptions to them.

3. Among the persons invited, and who became subscribers, were plaintiff and his assignors, who subscribed for 650 shares, relying on said representations and statements (p. 116, fol. 348; p. 751, fol. 2253).

4. By the syndicate agreement defendant was appointed agent and attorney of the plaintiff and his assignors (p. 764, fol. 2292). He was also promoter of the scheme or enterprise provided for in the syndicate agreement (p. 764, fol. 2292). As such agent, attorney and promoter he occupied a relation of trust and confidence toward plaintiff (p. 750, fol. 2248; p. 765, fol. 2293); and undertook to direct and manage the syndicate agreement and act thereunder as the agent and attorney of the subscribers with power to fully and effectively carry out the purposes of the agreement (pp. 748-9, fol. 2245).

5. It was defendant's duty to make full and complete disclosure of his stockholdings and interest in the United States Iron Company and in the proposed scheme set forth in the syndicate agreement, and to give to plaintiff and his assignors as full information as he possessed in relation to said subscription, and of any fact which would affect their interest, or that of either of them (p. 117, fol. 351).

6. Plaintiff and his assignors had no knowledge of defendant's ownership of said shares or of his

possessing any interest in the United States Iron Company, and made their subscriptions in ignorance thereof (p. 117, fol. 350).

7. Defendant failed and omitted to disclose his ownership of stock in the United States Iron Company and that he was possessed of any pecuniary interest in said company (p. 117, fol. 349).

8. At the time defendant subscribed to said syndicate he did not intend to pay his subscription in cash or otherwise than in stock in the United States Iron Company (p. 8, fol. 22).

9. Defendant at no time informed plaintiff and his assignors that it was his intention to pay said subscription in stock and not in cash (p. 8, fol. 24).

10. After the subscriptions by plaintiff and his assignors the name of the United States Iron Company was changed to that of the Sheffield Coal & Iron Co., and its stock increased from $1,000,000. to $2,000,000., and the defendant delivered to plaintiff and his assignors in return for the money they paid to him as their subscriptions, stock of the said company at par, and never delivered anything else for or on account thereof (p. 756, fol. 2268).

11. The Sheffield Coal & Iron Co. proved unprofitable and a failure, has become insolvent, was placed in the hands of a Receiver, and the stock issued to plaintiff and his assignors in payment of their subscriptions has become practically worthless (p. 757, fol. 2271).

The complaint then alleges and the Referee finds the discovery by plaintiff and his assignors of defendant's interest and concealments; their election to rescind; their notice of rescission; their offer to return and defendant's refusal to accept what they had received (p. 118, fols. 352-3); that neither of

them had been guilty of laches or of omission of duty or obligation which they owed to the defendant, and the assignments to plaintiff of the claims of his assignors (p. 118, fol. 353).

As Conclusions of Law the Referee found:

1. It was defendant's duty to make adequate, full and complete disclosure of his ownership of stock in the United States Iron Company and of his interest which he possessed therein and of any fact which affected the interest of the subscribers to the syndicate agreement (p. 117, fol. 351; p. 118, fol. 354).

2. He failed and omitted to make such disclosure, and his failure so to do operated, in law, as a fraud upon plaintiff and his assignors and upon each of them (p. 119, fol. 355), and judgment was ordered for the several amounts due plaintiff and his assignors (p. 119, fols. 356-7).

The Referee's opinion will be found on page 121, *et seq.*

The Circuit Court of Appeals held that the facts found by the Referee support the judgment rendered (p. 862), but that they were authorized to re-examine the question whether the complaint stated a cause of action, as this was a question of law arising upon the face of the record, and raised the question whether the facts found by the Referee supported the judgment he entered. Upon such re-examination, the Court held that it was necessary to a rescission that the defendant should be placed *in statu quo;* that neither through himself, nor through the medium of the purchasing company, could defendant be restored to his original position, and that the right to rescind was lost, "as" says the Court, "it may well happen that because of the peculiar situation of any particular case, no right of rescission exists in favor of one

who has been led by fraud into a complicated agreement which has been fully executed" (p. 863).

The reversal by the Circuit Court of Appeals was upon the single point: "That the complaint did not state a cause of action because the plaintiff and his assignors did not put defendant *in statu quo* by tendering to him all that they had received from him for the money paid to him."

Attention should be directed to the fact that defendant insisted on including in the record a "narrative statement of proceedings before the Referee," commencing on page 135 and ending on page 716, also requests for findings (pp. 717-769) and exceptions (p. 770) which the petitioner contended were not a part of the record, and because no bill of exceptions could be allowed after a written waiver of a jury trial and a trial by consent before a referee selected by the parties, and that the only question open to review is whether the facts found by the Referee support the judgment rendered. No bill of exceptions was signed or sealed by the District Judge, and, although he permitted the narrative statement and said requests and exceptions to be filed, he refused to permit them to be filed as a bill of exceptions settled by the Court (p. 716).

A motion was thereafter made to expunge the same from the record, but the Circuit Court of Appeals refused for the time being in an opinion as follows:

> "This voluminous record has already been "printed, and it may require very careful "scrutiny to determine just what parts of it "are not properly before us. For this reason "it seems wiser to deny the present motion "to strike out parts of it. The questions "presented may be disposed of on the main "argument.
>
> "In making this disposition of the motion,

"we are not to be understood as intimating "any departure from the well-settled prac- "tice announced in decisions of the Supreme "Court and of this Court as to what ques- "tions are open to review on writ of error "from a judgment entered after a hearing "before a referee."

Our position is that at common law the only recognized method of trying issues of fact was by a judge and jury, and if by consent of the parties the trial is had before a judge, without a jury, or before an outsider as referee, the judge or referee, as the case may be, acts as arbitrator between the parties. His rulings admitting or excluding evidence, and his findings of facts, are not acts performed by him in a judicial capacity. They cannot be made the subject of an exception under the statute, nor are they brought up for review by writ of error. The only question brought up by a writ of error in such a case is whether there was any error of law in the judgment of the Court rendered upon the pleadings. This was the situation in the United States courts prior to 1865. A clear and exhaustive statement of the law on this subject will be found in *Campbell* v. *Boyreau* (21 How., 223, at pp. 225 to 227).

By act of Congress, passed March 3, 1865, which has since become Sections 649 and 700 of the United States Revised Statutes, it was enacted that, when the parties, by a stipulation in writing, waived a jury trial and consented to go to trial before a judge without a jury, the findings of the Court upon the facts should have the same effect as the verdict of a jury, and his rulings in the progress of the trial might be reviewed by writ of error. This is now the law in the United States Courts in regard to trials of common law actions, by consent, before a judge without a jury under a written waiver of jury trials. When the trial is before a judge upon an oral stipulation, or before

a referee upon any kind of a stipulation whatever, the statute has no application, but the common law applies; the rulings of the judge or referee upon the trial are not subject to review; a bill of exceptions to them is "irregular and unavailing"; and the rule above expounded in the case of *Campbell* v. *Boyreau, supra,* applies, with a modification by later cases, namely: that when the Referee has made specific findings of fact which are made the findings of the Court and incorporated in the record, the appellate Court will review, on writ of error, the question whether the facts as found by the Referee support the judgment entered by the Court. In no other respect is the rule relaxed. There is no reported case holding that a bill of exceptions may be had; but there is a long line of cases holding the contrary:

David Lupton's Sons Co. v. *Automobile Club* (225 U. S., 489).

Shipman v. *Straitsville Mining Co.* (158 U. S., 356).

Andes v. *Slauson* (130 U. S., 435).

Roberts v. *Benjamin* (124 U. S., 64).

Paine v. *Central Vermont R. R. Co.* (118 U. S., 152, 158).

Bond v. *Dustin* (112 U. S., 604).

Newcomb v. *Wood* (97 U. S., 581).

Steel v. *Lord* (93 Fed., 728).

Hudson River Pulp & Paper Co. v. *Warner* (99 Fed., 187).

Parker v. *Ogdensburgh & L. C. R. Co.* (79 Fed., 817).

U. S. Fidelity & Guaranty Co. v. *Hampton* (134 F., 734).

U. S. v. *Ramsey* (158 Fed., 488).

Rush v. *Newman* (58 Fed., 158).

Shipman v. *Ohio Coal Exchange* (70 Fed., 652).

Assignment of Errors and Specification of Errors Relied On.

1. The Circuit Court of Appeals erred in reversing the judgment herein, inasmuch as proper deference and respect for the decision of the New York Court of Appeals in *Hecksher* vs. *Edenborn* (203 N. Y., 210), should have led the Circuit Court of Appeals to lean toward following the said decision of the New York Court of Appeals.

2. The Circuit Court of Appeals having held that no conclusion can be reached with confidence, erred in reversing the judgment herein, and in refusing to follow said decision of the New York Court of Appeals, accepting that of the Appellate Division of the Supreme Court in *Hecksher* vs. *Edenborn* (131 App. Div., 253), especially for the reasons expressed by Justice Miller at page 266, notwithstanding that said decision of said Appellate Division had been reversed by the New York Court of Appeals and said opinion was a minority opinion overruled by the said Court of Appeals.

3. The Circuit Court of Appeals erred in reversing the judgment upon the ground that the complaint failed to show that the defendant was put *in statu quo* inasmuch as it appears upon the facts stated in the complaint and found by the Referee that defendant was put *in statu quo,* unless his own wrongful acts had so complicated the transaction complained of as to prevent plaintiff and his assignors from doing so.

4. The Circuit Court of Appeals having decided that the findings of the Referee were binding upon it, and support the judgment rendered, erred in reversing the said judgment holding that the complaint failed to state a cause of action because a consideration of the syndicate agreement satisfied it that the defendant could not be restored to his original position.

5. The Circuit Court of Appeals erred in reversing the judgment on the ground that the complaint failed to show that the defendant was put *in statu quo* inasmuch as on the facts stated in the complaint plaintiffs and their assignors did, as far as possible, place him *in statu quo* by tendering to him all that they had received from him.

6. The Circuit Court of Appeals erred in reversing the judgment on the ground that the complaint failed to show that the defendant was put *in statu quo* inasmuch as there was no assignment of error by the defendant (plaintiff in error below), specifying as a ground of error that the defendant was not put *in statu quo*, and the point was not raised at the trial.

7. That the assignments of error set forth in the record on page 781 to 850, inclusive, are a perversion of the rule relating thereto, and insufficient to raise for review the alleged errors upon which the Circuit Court of Appeals reversed the judgment herein.

8. The Court erred in reversing the judgment herein on the ground that "because of the peculiar situation of any particular case no right of rescission exists in favor of one who has been led by fraud into a complicated agreement which has been fully executed", and "that this is such a case", inasmuch as fraud will, if it is acted upon promptly when discovered, be a ground for rescinding an executed contract.

9. The Court erred in reversing the judgment on the ground that "if the syndicate subscribers have any right of rescission, that right must be worked out through the purchasing company," inasmuch as the wrong and injury complained of was done to syndicate subscribers individually and personally, and was not a wrong and injury to corporate property, which must be redressed through the company.

BRIEF OF THE ARGUMENT.

FIRST: PROPER DEFERENCE AND RESPECT FOR THE DECISION OF THE NEW YORK COURT OF APPEALS IN HECKSHER *v.* EDENBORN (203 N. Y., 210) SHOULD HAVE LED THE CIRCUIT COURT OF APPEALS IN A CASE BALANCED WITH DOUBT, TO LEAN TOWARD FOLLOWING THE DECISION OF THAT COURT. NOT TO DO SO WAS A DISREGARD OF THE RULE OF COMITY RESPECTING DECISIONS OF THE FEDERAL AND STATE COURTS REPEATEDLY ANNOUNCED BY THIS COURT.

Specification of Errors Nos. 1 and 2.

I.—The duty of the Circuit Court of Appeals to lean to agreement with the State Court, as a matter of comity between the Federal and the State Courts, was so plain, has been so often defined, and has received such careful and painstaking consideration by this Court, that it is unnecessary to enter upon an argument on the subject, or do more than refer to the principal authorities.

Messinger v. *Anderson* (225 U. S., 436).

Kuhn vs. *Fairmount Coal Co.* (215 U. S., 349).

Equitable v. *Brown* (213 U. S., 25).

Chicago Seminary vs. *Illinois* (188 U. S., 662, at p. 674).

Bienville Water Supply Co. vs. *Mobile* (186 U. S., 212, at p. 220).

Forsyth vs. *Hammond* (166 U. S., 506).

B. & O. Railroad vs. *Baugh* (149 U. S., 368, at p. 370).

Bucher vs. *Cheshire Railroad Co.* (125 U. S., 555).

Burgess vs. *Seligman* (107 U. S., 20).

II.—The case now presented is the same in every respect, except as to the name of the plaintiff, as the case of *Hecksher* vs. *Edenborn* (203 N. Y., 210).

III.—That action was decided by the Court of Appeals of New York, October 17, 1911 (203 New York, 210). Seven judges unanimously held that the plaintiff was entitled for fraud to rescind his subscription to the syndicate agreement, and recover moneys paid to defendant thereunder, on restoration of what was received. The cause of action, the subject-matter of the action, the facts involved, were precisely the same in that case as in this, the only difference being that the plaintiffs in the respective cases were different subscribers to the syndicate agreement.

IV.—In deciding this case the Referee, Honorable Edward W. Hatch, formerly a Justice of the Appellate Division of the Supreme Court of New York, followed *Hecksher* v. *Edenborn* (203 N. Y., 210) and his opinion will be found in the record at page 121.

V.—The Circuit Court of Appeals for the Second Circuit rejected *Hecksher* v. *Edenborn*, and adopted a decision, and an opinion—not a prevailing opinion—in the Appellate Division (131 App. Div., 253), both of which had been overruled by the New York Court of Appeals. There is, therefore, a direct conflict between the Court of Appeals of New York and the Circuit Court of Appeals. The Court of Appeals of New York held that upon the facts stated in the complaint the plaintiff was entitled to rescind the syndicate subscription, and recover moneys paid thereunder, on restoration of what he had received; the Circuit Court of Appeals held that he was not. The former holds that the rescission was effectual because defendant was a wrongdoer who prepared the syndicate agreement, and so complicated the matter that if plaintiff and his assignors were unable to put him *in statu quo*, he was responsible for it, and it was therefore un-

necessary for them to do so, citing well-considered authorities; the latter holds that although a wrong-doer, who created the complicated scheme, it was necessary to put him *in statu quo,* just as if he were an innocent party who had done nothing to prevent it. The facts alleged in the complaint were exactly the same as those set forth in the Hecksher case. Upon identical facts the Hecksher case holds that there was a cause of action stated, and the Sim and Alder cases hold that there was not.

VI.—The cases were balanced with doubt, and this the Circuit Court of Appeals concedes.

The opinion says:

> "Where Judges have differed as much as "they have in this case, *no conclusion can be "reached with confidence,* but we arrive at that "of the Appellate Division in Hecksher *vs.* "Edenborn (131 App. Div., 253), especially "for the reason expressed by Justice Miller at "page 266."

VII.—In view of the unanimous decision of the seven Judges of the Court of Appeals of the State of New York, the opinion of one of the four Justices of the Appellate Division, and that of the Justice before whom the first trial of *Hecksher* vs. *Edenborn* took place—nine out of twelve holding that the defendant was liable—this want of confidence was well expressed, and should have led the Circuit Court of Appeals to lean toward agreement with the New York Court of Appeals.

VIII.—May we not also urge that the fact that a re-argument has been ordered by this Court presents a case of doubt that calls for an application of the rule of comity, which if not now followed, will cease to be a safeguard and guide.

IX.—The opinion of the Circuit Court of Appeals introduces diversity and lack of uniformity in the Courts, and perplexity and uncertainty as to legal rights. Not only will the Courts be at a loss how to decide but, in the multitude of transactions growing out of syndicate agreements, and where agents, trustees and others occupying fiduciary relations commit constructive frauds, the legal profession will be involved in doubt and uncertainty as to what advice to give in similar transactions. Conflicting adjudications involving conflicting rules of law and attendant uncertainty as to legal rights, is one of the greatest evils in jurisprudence. In the present case, we have a striking instance of radical and pronounced diversity where there should be uniformity.

SECOND: HECKSCHER *v.* EDENBORN (203 N. Y., 210) IS A WELL SUPPORTED ADJUDICATION AGAINST EDENBORN IN AN ACTION INVOLVING THIS VERY SYNDICATE AGREEMENT, THAT THE SYNDICATE SUBSCRIBERS WHO MADE AND PAID THEIR SUBSCRIPTIONS HAVING NO KNOWLEDGE OR INFORMATION OF EDENBORN'S MAJORITY OWNERSHIP IN, AND CONTROL OF, THE UNITED STATES IRON COMPANY, AND THAT HE DID NOT INTEND TO PAY HIS SUBSCRIPTION OF $500,000 IN CASH BUT IN STOCK, AND THAT AS AGENT AND ATTORNEY OF THE SUBSCRIBERS HE WAS ENGAGED IN PURCHASING FROM HIMSELF HIS OWN PROPERTY, ARE ENTITLED TO RECOVER.

Specification of Error No. 2.

I.—That case holds that he occupied a fiduciary relation to the subscribers to said agreement. And the Referee so finds (p. 765, fols. 2292-3).

(1) The opinion of the Court says:

"He did not occupy the position of an ordi-
"nary vendor but he was inviting others to

"confer upon him a fiduciary relationship" (p. 222).

(2) This accords with the universal rule upon that subject.

Dickerman v. *Northern Trust Company* (176 U. S., 181 at p. 203);
Yeiser v. *United States B. & P. Company* (107 Fed., 340);
Brewster v. *Hatch* (122 N. Y., 349).

II.—The burden was upon Edenborn to show that before the plaintiff and his assignors subscribed the Syndicate agreement appointing him their agent to purchase the United States Iron Company, he made a full and fair disclosure of his interest therein.

(1) In the *Heckscher* case, the opinion says:

> "When he (Edenborn) solicited plaintiff's "assignors to become parties to the Syndicate "and appoint him one of their agents under "the circumstances referred to, he must be "held to have represented that he was legally "qualified to discharge the powers which "were being conferred upon him and the ob- "ligation affirmatively rested upon him to "inform them of his interest in the property "which he was securing authority to buy, if "he would hold them to their contract and "avoid the imputation of legal misconduct "which the law fastens on an agent who at- "tempts to serve the interests of both the "principal and himself" (p. 22).

III.—But we need not rely upon rules of law, for the defendant admits in his answer, by not denying the allegation, that

> "It was his duty to make to said sub- "scribers full disclosures of all facts and cir- "cumstances which were within defendant's "knowledge, which said subscribers ought to "have known in order to enable them to form

"an independent judgment and protect their "interests" (fol. 14).

IV.—The Referee finds as a matter of fact as well as a conclusion of law (pp. 117-8, fols. 351-354), that Edenborn's duty was to make full and complete disclosure of his interest in the United States Iron Company, of his stockholding therein and of any other interest which he had in such company and in the proposed scheme provided for in the Syndicate agreement, and to give to the said subscribers and each of them as full information as defendant possessed in relation to said subscriptions, and of any facts which would affect their interests or the interests of any or either of them, and that he failed and omitted to make such disclosure.

(1) In the *Heckscher* case the Court uses this language:

> "The principle that a person occupying a "position of agent to purchase may not sell "his own property to his principal is so ele- "mentary that it need only be stated. It "must be quite as elementary and true that, "if one by misrepresentation or suppression "of facts when he ought to speak, induces "another ignorantly to make a contract ap- "pointing the first his agent to buy and "conferring upon him discretionary power "to purchase his own property, the contract "is voidable and, even if executed, may be "rescinded and the money recovered back on "restoration of what has been received."
>
> "The defendant comes within these prin- "ciples. When he solicited plaintiff's assignors "to become parties to the Syndicate and ap- "point him one of their agents under the cir- "cumstances referred to, he must be held to "have represented that he was legally quali- "fied to discharge the powers which were "being conferred upon him and the obligation "affirmatively rested upon him to inform them

"of his interest in the property which he was "securing authority to buy if he would hold "them to their contract and avoid that impu- "tation of legal misconduct which the law "fastens on an agent who attempts to serve "the interests of both the principal and him- "self."

"He did not occupy the position of an or- "dinary vendor, but he was inviting others "to confer upon him a fiduciary relationship. "If he knew and they were ignorant of the "same fact which attacked the very sub- "stance of that relationship and legally de- "stroyed his ability to meet its full require- "ments, it was his duty to advise them of it "and for his failure so to do they were en- "titled to repudiate the agreement and avoid "what had been done under it."

V.—There is no pretense that Edenborn ever informed the plaintiff or his assignors of the following facts:

1. That he owned a controlling interest in the United States Iron Company which he intended to sell to the syndicate (p. 117, fol. 349).

2. That he did not intend to pay his subscription of $500,000 "in dollars," as called for by the syndicate agreement, but largely by the transfer of his stock interest in said company.

VI.—If Edenborn had intended to inform the plaintiff and his assignors that he owned the controlling interest in the United States Iron Company how simple it would have been for him to have stated this fact in the syndicate agreement, and if he did not intend to pay his subscription "in dollars" but in stock in the United States Iron Company how important it was that Edenborn should have disclosed this fact. It would have made the greatest possible difference to the plaintiff and his assignors

if they had known that Edenborn only intended to turn in stock while they were paying actual cash. This concealment was fraud.

Tyler v. *Savage*, 143 U. S., 79, at p. 98.

VII.—The Referee, in his opinion, says:

> "Each of the subscribers who were repre-
> "sented in this action have testified that they
> "knew nothing of the ownership by the de-
> "fendant of the capital stock of the United
> "States Iron Company. On the contrary
> "they testified that they had no information
> "at the time of making the subscription that
> "the defendant was the owner of stock in
> "the United States Iron Company and did not
> "learn of such fact until the Heckscher
> "action was tried. This testimony is prac-
> "tically uncontradicted and must be taken as
> "true in every substantial aspect. The defend-
> "ant does not claim that he, at any time
> "made disclosure to any of the subscribers to
> "the syndicate agreement of his ownership
> "of the shares in the United States Iron
> "Company."

VIII.—Edenborn obtained the money from Sim and his assignors by false pretense:

1. That nothing existed to disqualify him from acting as their agent in purchasing with their money the property named in the paper.

2. That he was qualified to act impartially and unselfishly, and in their own interest alone.

3. That he had no interest that was hostile to theirs.

4. That he was subscribing $500,000 *"in dollars;"* that is to say, in cash, whereas at no time did defendant intend to pay his subscription to said Syndicate except by putting in his stock in the United States Iron Co., and whatever cash was needed in addition to make the full amount of his

subscription, and that in part payment of his subscription, said defendant transferred his said 5,365 shares of stock in said United States Iron Company to said Syndicate at $70.00 per share.

5. He obtained their money by suppressing the fact that he was obtaining an appointment from them to act for them in a transaction in which he, as their agent, would deal with himself.

IX.—Plaintiff and his assignors had implicit faith in Edenborn. They blindly trusted him. Their signatures to the paper making Edenborn their agent and attorney, agreeing to entrust their money to him, were obtained by false pretenses. The agreement had its origin in fraud. It declares at the outset that "whereas an opportunity is afforded for acquiring the stock of the United States Iron Company at par", etc., its main purpose and object was to avail itself of this opportunity. Behind the syndicate agreement we discover respondent as the dominant and chiefly interested figure. When he had himself appointed agent and attorney of the subscribers to the agreement to purchase the stock of the United States Iron Company at par, his first step in committing the fraud was to conceal the fact that he was having himself appointed agent and attorney to buy from himself his own property.

X.—The paper making him their agent, and everything that was done thereafter rested on a false foundation, to wit: Edenborn's ability in each and every instance, not only in one transaction but in every transaction, to act for them as their faithful agent and trustee in purchasing property with their money.

XI.—Sim and his assignors entrusted their money to Edenborn to invest for them because they

had signed the paper constituting him their agent upon his representation that he had subscribed $500,000 payable in dollars. If he had not succeeded in inducing them to sign the paper constituting him their agent, and relying on his subscription, they would not have entrusted their money to him. Everything that was done, was done because Edenborn had induced them or allowed them to appoint him their agent, without disclosing his adverse interest in the transaction, and that he did not intend to pay his subscription in cash but largely in stock. It was all a part of the transaction constituting Edenborn the agent of each of them.

XII.—The paper contemplated that the "Syndicate Managers" should, if they deemed proper, buy coal lands, coke ovens and blast furnaces, to be used in connection with the United States Iron Company property, which was an iron property. The United States Iron Company was the basic property of the entire enterprise. They were to buy coal lands, coke ovens and blast furnaces to round out the situation. If Edenborn's own property had not gone in there would have been no occasion to buy the other property, which was merely the fringe on the garment.

XIII.—The courts, in the cases to which we shall refer, have said that the conduct of an agent in acting for himself and his principal in the same transaction "is poisonous in its consequences," and that the transaction itself "is to be destroyed in every instance."

XIV.—We respectfully commend to the consideration of the Court as confirming the above quotation of the case of *Heckscher* v. *Edenborn* (203 N. Y., 210), the language of Mr. Justice Lurton in

United States v. *Carter* (217 U. S., 286, at the foot of page 305, and at pp. 306-9), and the following cases:

Michoud v. *Girod* (4 How., 593).
In re Frazin and Oppenheim (181 Fed., 307, at p. 309).
Brookes v. *Martin* (2 Wall, 70).
Wadsworth v. *Adams* (138 U. S., 380, at p. 388).
Glover v. *Ames* (8 Fed., 351).
Crystie v. *Foster* (61 Fed., 551).
McKenly v. *Williams* (74 Fed., 94).
Alger v. *Anderson* (78 Fed., 729).
Mastin v. *Noble* (157 Fed., 506).
Byrne v. *Jones* (159 Fed., 321).

XV.—Plaintiff and his assignors owed no duty to investigate to ascertain whether defendant was committing fraud. They were not dealing at arm's-length. Defendant occupied a relation of trust and confidence. There was nothing to arouse suspicion. As attorney and agent of plaintiff and his assignors he took advantage of his position to commit the fraud complained of. Under these circumstances plaintiff and his assignors owed no duty to investigate.

20 *Cyclopedia of Law*, 60.
Baker v. *Lever*, 67 N. Y., 304.
Directors v. *Kisch*, L. R., 2 H. L., 99.
Enderly v. *Johns*, 120 Ill., 469.
Cleveland v. *Richardson*, 132 U. S., 318 (which notes the distinction where there is a relation of trust and confidence).
Shappiro v. *Goldberg*, 192 U. S., 232.

XVI.—The Referee, it is true, acquits defendant of any intent to deceive and defraud, and he did so evidently because the motive or intent is wholly immaterial.

In the *Heckscher* case (203 N. Y., 210, at p. 19) it is said:

> *"I do not find any evidence that the defend-*
> *"ant was guilty of that active fraud* disclosed
> "in many cases where consciousless promoters
> "have accumulated property at a low price
> "under a well devised scheme to unload it
> "upon others at a high price. There is noth-
> "ing to indicate that the defendant acquired
> "his stock in the United States Iron Company
> "for any such purpose or that the stock pur-
> "chased by him and his associate managers in
> "that Company was not fairly worth the price
> "paid for it which was 30.00. per share less
> "than the price fixed in the Syndicate agree-
> "ment. But broadly speaking the plaintiffs
> "must rest their claim to relief on the basic
> "principle that defendant induced them ig-
> "norantly to execute an agreement which vio-
> "lated the rule that an agent to buy may not
> "purchase of himself."

XVII.—It is the universal rule not only that the agent must make a full and fair disclosure of all the facts and circumstances within his knowledge in any way calculated to enable the principal to judge of the propriety of the same, but when it is questioned by the principal, the burden is upon the agent of proving affirmatively that he dealt fairly, and in the strictest good faith imparted to his principal all the information possessed by him concerning the property.

> *Am. and Eng. Ency. Title Agency,* Vol. 1, p. 1081.
>
> *Cyc. of Law, Title Principal and Agent,* Vol. 31, pp. 1431-1440.

XVIII.—Therefore it is entirely immaterial whether or not the defendant *intentionally* concealed his interest in the United States Iron Company or his ownership of its stock from the plaintiff or his assignors or any other facts. If the de-

fendant refers to the findings of the Referee on this subject embodied in his requests to find we reply that he may not have *intended* to conceal but the fact is that he *did* conceal. It might just as well have been found he intended to disclose but did not disclose. If it was his duty, as he admits it was, to disclose, it is no answer to his failure to disclose that he intended to disclose but unintentionally did not do it, or that he did not intend to conceal but unintentionally did conceal.

> "In *Heckscher* v. *Edenborn* the Court say: "the conclusion has been reached that so far "as it authorized the purchase of defendant's "property, it was constructively fraudulent *"even though there were no actual fraudulent "motive on his part"* (Britton *v.* Ferris, 171 N. Y., 235).

XIX.—In connection with *National Bank* vs. *Petrie* (189 U. S., 423), was decided the case of *National Bank* vs. *Carr* (189 U. S., 426), an action on a rescission of a transaction in which bonds belonging to the bank were sold and delivered to the plaintiff below. The cases were on writs of error to the Court of Appeals and to the Supreme Court of the State of New York. The judgments below were affirmed.

Mr. Justice Holmes said:

> "This case is similar in substance pleading "and argument to the foregoing with the "additional fact that the president of the "bank acted as the confidential adviser of the "defendant in error, and did not reveal to her "that the bonds belonged to the bank or that "he was on both sides of the transaction in- "terested against her. As soon as she found "out that the bank was the seller she re- "pudiated the sale." Judgment affirmed.

The Court of Appeals said in the same case (*Carr* v. *National Bank*, 167 N. Y., 375):

> "The appellant argues that the facts did not "establish any actual fraud on the part of the "defendant, but that was not essential to the "granting of the relief which plaintiff de- "manded. There was shown to have been such "a condition of things in the situation of the "parties and the ignorance in which the plain- "tiff was kept of material facts by ways of sup- "pression or of misrepresentation as in equity "to warrant her in wholly repudiating the "transaction. *It is quite immaterial that "there may have been no intention to actually "defraud* (Hammond *v.* Pennock, 61 N. Y., "145)."

XX.—The following is from the opinion in *Robertson* vs. *Chapman* (152 U. S., 673, at p. 681), which involved a transaction where it was claimed that an agent to sell effected a sale to himself.

> "The law will not in such a case impose "upon the principal the burden of proving "that he was in fact injured, *and will only "inquire whether the agent has been unfaith- "ful in the discharge of his duty.* While his "agency continues he must act in the matter "of such agency solely with reference to the "interests of his principal. The law will not "permit him without the knowledge or assent "of his principal to occupy a position in which "he will be tempted not to do the best he may "for the principal."
>
> *Mastin* v. *Noble*, 157 Fed., 506, 509.
>
> *Marye* v. *Strouse*, 5 Fed., 483.
>
> *Conkey* v. *Bond*, 36 N. Y., 427.

XXI.—It follows, therefore, that where one has himself appointed agent to purchase certain property if he sees fit, without disclosing that it is his own property that he is having himself appointed agent to purchase, the appointment, and, in fact, the entire transaction, must be declared by the

courts to be void *ab initio* at the instance of the principal, irrespective of fraudulent intent.

Pence vs. *Langdon*, 99 U. S., 578.
Downey vs. *Finucane*, 205 N. Y., 250.
Mack vs. *Latta*, 178 N. Y., 525 (which holds that a recovery may be had of a defendant although he received no benefit from the transaction).
Morgan vs. *Skiddy*, 62 N. Y., 319.
Directors vs. *Kisch*, L. R., 2 H. L., 113.
Hornblower vs. *Crandall*, 7 Mo. App., 220. Aff. 72 Mo., 581.
Franey vs. *Warner*, 96 Wis., 222.
Hebgen vs. *Koeffler*, 97 Wis., 313.

THIRD: THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING CONTRARY TO HECKSHER V. EDENBORN THAT THE COMPLAINT DID NOT STATE A CAUSE OF ACTION BECAUSE ON THE FACTS SET FORTH THEREIN DEFENDANT WAS NOT PLACED IN STATU QUO.

Specifications of Errors Nos. 4, 5 and 6.

I.—The point on which the Circuit Court of Appeals decided the case—that upon the facts stated in the complaint the defendant was not and could not be placed *in statu quo*—was not raised on the trial or assigned as error in the Circuit Court of Appeals. If the record is examined it will be clear that until the submission of defendant's brief on the Writ of Error to the Circuit Court of Appeals, the point was not raised. It is not referred to in the Demurrer (p. 25), or the Answer (p. 79, fol. 237), or the Motions to Dismiss (pp. 292, 511),—nor is it assigned to error

II.—The judgment of the District Court on the Demurrer expressly decided that the "complaint states a cause of action at common law based on the rescission of a contract alleged to have been

procured by fraud" (p. 59, fol. 177). No attempt was made by defendant to obtain a review of this decision, and no motion was made in arrest of judgment.

III.—The Referee's opinion deals with this subject and followed, as was his duty to do, the decision of the Court of Appeals in *Hecksher* v. *Edenborn*. He says:

> "In that case the Court of Appeals had be-
> "fore it for decision the sufficiency of a com-
> "plaint which was in all respects similar to the
> "complaint in the present action. It reached a
> "conclusion, reversing the judgment of the Ap-
> "pellate Division, that the complaint stated a
> "good cause of action based upon a proper
> "rescission and held that moneys paid upon
> "the contract which had been induced by
> "fraud, whether actual or constructive, could
> "be recovered back."

IV.—The New York Court of Appeals says of the cause of action set forth in the complaint in the Hecksher case which was similar to this:

> "This action is not one for damages or one
> "to secure the rescission of a contract, but is
> "one based on a prior rescission. In each
> "cause of action plaintiff alleges in substance
> "that he or his assignors, as the case might
> "be, after learning of the interest of respond-
> "ent in the properties to be purchased 'and
> "the falsity of his representations hereinbe-
> "fore set forth,' tendered back to him all of
> "the stock, received under said syndicate
> "agreement, on account of his payment of
> "the amount subscribed,' and demanded of
> "said Edenborn the return to him of said
> "sum * * * so paid by him as aforesaid.
> "Said complaint also in like manner alleges
> "that the plaintiff and his respective assign-
> "ors have respectively 'rescinded said Syndi-
> "cate agreement and his subscription thereto,
> "and is entitled to receive from said defend-
> "ant said sum' subscribed and paid as afore-

"said, and in conclusion the complaint de-
"mands judgment for the aggregate amount of
"the sums paid in by said parties. * * *

"The jury were entitled to find, amongst
"other facts, that the defendant was the
"chief promoter and organizer of an enter-
"prise which, however reputable and legiti-
"mate, contemplated as its very basis the
"purchase of a million dollars par value of
"the stock of a certain corporation of which
"he was the majority owner; that the syndi-
"cate agreement made defendant and his
"two associate managers agents of the
"various subscribers and gave them discre-
"tionary power to purchase the stock; that
"defendant, who had held rather intimate and
"influential relations with some at least of
"plaintiff's assignors, in effect invited or so-
"licited them to become parties to the project
"and subscribers to the agreement; that at the
"time they were ignorant of his interest in the
"property to be acquired, and that he did not
"inform them of such interest, but on the con-
"trary his apparent subscription of $500,000
"on the paper showed to them, and various
"statements which he made, as that he was
" 'putting in cash the same as' one of the sub-
"scribers and that 'any man in joining (the
"syndicate) puts in a dollar against the other
"man's dollar,' and that there was no 'inside
"profits,' at least tended to exclude the idea
"that defendant was the owner of a large
"amount of property to be acquired and which
"would in effect offset or pay his large sub-
"scription, when as a matter of fact he always
"intended to transfer his stock to the syndicate
"as he did. It seems to me that if these facts
"should be found a court would be entitled to
"find fraud as a matter of fact for which the
"agreement could be rescinded and moneys
"paid thereunder recovered back."

V.—The complaint herein after alleging in paragraph "First" (pp. 34 and 35, fols. 102-105) that defendant promoted, formed and carried out the syndicate agreement and "personally controlled

and managed the promotion and operation of the syndicate and the moneys subscribed thereto," and in paragraph "Second" (p. 45, fols. 105-106) the relation of trust and confidence which defendant occupied toward the subscribers, and in paragraphs "Third" and "Fourth" (pp. 36-37, fols. 107-110) the representations and statements made by defendant; his concealment of his majority ownership of the capital stock of the United States Iron Company; that he was buying from himself individually and selling to himself as agent and attorney for the subscribers his own property and that his subscription of $500,000. payable in dollars, he did not intend to pay in dollars, but in stock of the United States Iron Company, and in paragraph "Sixth" (p. 38, fol. 114) the making of the subscriptions relying on a full disclosure by defendant, alleges upon the subject of recission as follows (p. 40, fol. 119):

> "EIGHTH: That the plaintiff as soon as pos-
> "sible after the discovery by him of fraud and
> "deceit and fraudulent concealment on the
> "part of the defendant practised on him as
> "aforesaid, notified said syndicate managers,
> "including defendant, that he elected to re-
> "scind his subscription to said syndicate
> "agreement and offered to return to defend-
> "ant all that he had received from him to wit;
> "the said certificates of stock and demanded
> "payment of the amount so as aforesaid paid
> "by him to defendant, which said offer and de-
> "mand were refused, and that he ever since has
> "been and now is ready and willing to deliver
> "up said certificates of stock upon receiving
> "payment of the amount paid by him as afore-
> "said."

VI.—The tender was made to the defendant for several good and sufficient reasons. 1, He was a syndicate manager and the tender to him was on behalf of the syndicate; 2, He was the wrongdoer from whom we seek relief; 3, He was the agent and

attorney of the syndicate subscribers who committed the fraud complained of; 4, It was he who delivered the stock, and it should be restored to him. 5, No question was made on the trial, nor is any raised by the Assignments of Errors as to the propriety and sufficiency of the tender to defendant. If the "narrative of proceedings" is examined, to ascertain what defendant conceded, it will be seen that the defendant conceded the propriety and sufficiency of the tender to defendant. The concessions appear on pages 201, 277, and the demands, as made, appear in Exhibits 71, 75, on pages 672, 674. Upon the evidence presented the Referee found as a fact (Record, p. 118) that a good and sufficient tender had been made.

VII.—It is apparent that defendant was put *in statu quo* when we consider what the *status quo* was. The complaint states the following facts: Defendant owned more than one-half of the United States Iron Company (p. 6, fol. 17). He, with Elwood and the Williams estate, owned within a few shares of the entire capital stock. The Company had proved unprofitable (p. 6, fol. 18). To put it on its feet, and extricate themselves, defendant conceived the scheme or plan embodied in the syndicate agreement (pp. 4-5, fols. 12-13). That agreement expressed at the outset that "an opportunity is afforded to acquire for a cash consideration the ownership, control and possession of the United States Iron Company of New Jersey, at par, said company being capitalied at $1,000,000." (p. 6, fol. 10; p. 100, fol. 302). This was for the benefit of Edenborn, who owned 5,365 out of 9,250 shares (p. 6, fols. 16-18). He must have believed that he would be benefited, otherwise he would not have prepared it, nor obtained subscriptions to it.

VIII.—Concealing the fact that he owned a majority of the stock of the United States Company,

and that he intended to transfer it to the syndicate in payment of his subscription which was payable "in dollars", he by false representations and statements induced plaintiff and his assignors, toward whom he occupied a relation of trust and confidence, to become subscribers (p. 5, fol. 15; p. 6, fol. 18) and thereby to appoint him their agent and attorney to purchase from himself his own property concealing the fact of his ownership.

IX.—The agreement was between the syndicate managers, of whom defendant was one, as parties of the first part, and the subscribers thereto *severally* (see Agreement, p. 101, fols. 301-2). There is nothing in the agreement which makes the subscriptions dependent upon each other, or creates an agreement by the subscribers between themselves, or prevents any subscriber from rescinding or cancelling his subscription.

X.—Suppose, at this point, before plaintiff and his assignors had paid their subscriptions, they had discovered the fraud practised by defendant, can there be any doubt they could have compelled a cancellation of their subscriptions on the ground of fraud? Or, in an action to compel payment of their subscriptions, that they would have had a complete defense on the same ground?

XI.—Subsequent facts show that when defendant, in payment of his subscription, surrendered his shares of stock in the United States Iron Company, at 70, to the Sheffield Coal & Iron Co. (which was nothing but the United States Iron Company with its name changed), with enough cash to make up his subscription, he did nothing, in fact, but put into the same old company, with its name changed, the difference between his 5,365 shares of stock of the United States Iron Company, at 70, and his sub-

scription of $500,000 (p. 8, fol. 24). But plaintiffs paid their subscriptions to defendant in cash and received from him certificates of stock in the Sheffield Coal & Iron Company (p. 9, fol. 26) representing, of course, their entire interest in all the property of that company, part of which was the amount of the cash difference paid in by defendant.

XII.—When, therefore, plaintiff and his assignors tendered to defendant their stock in the Sheffield Coal & Iron Co. received from him, they restored to him every interest which they had acquired in the Sheffield Coal & Iron Co. under the syndicate agreement, including their interest in defendant's cash payment.

XIII.—Defendant claims that in carrying out the Syndicate Agreement he put the cash subscriptions into properties which were conveyed to the Sheffield Coal and Iron Company and insists that plaintiff on rescission should have tendered such properties to him—in other words, that plaintiff must undo everything done under the Syndicate Agreement—notwithstanding that Edenborn did what he claims he did in carrying out his own fraudulent enterprise. He cannot take advantage of a situation created by himself in working out his own fraud. The law only requires the injured party to restore what he received. All that plaintiff and his assignors received from Edenborn for the money they entrusted to him was Sheffield Company stock, and this was tendered. This tender put him *in statu quo* as between himself and the subscribers whom he defrauded.

XIV.—The Circuit Court of Appeals in discussing the subject inquires:

> "How could an individual subscriber by "tendering the defendant his stock in the re-"organized Company representing a propor-"tionate interest in other properties greatly

"exceeding in value the amount of the "defendant's interest in the original capital "of the United States Iron Company and de- "manding back his whole subscription restore "the defendant to his original position?"

XV.—Our answer is, the plaintiff and his assignors were under no obligation to defendant except to restore the *status quo* "as far as possible". This they did when they tendered their stock representing their entire interest in and under the Syndicate Agreement. They could do no more. Defendant's fraud not only rendered it unnecessary, but absolutely prevented it. Defendant, being one of the syndicate managers, and majority owner of the stock of the United States Iron Company was in complete control of the company and of the syndicate. He had the largest individual interest and was the moving spirit. He owned over one-half of the United States Iron Company and one-fifth of the Sheffield Coal & Iron Company. The syndicate was managed and controlled by him. He received the subscriptions. He conducted the operations of the syndicate. Nothing could be done without his consent. Plaintiff and his assignors had no voice or control in the matter. So far as the management of the syndicate and control of the Sheffield Coal & Iron Company are concerned, defendant was dominant, and plaintiff and his assignors were powerless. The only thing they controlled in the whole matter was their stock in the Sheffield Coal & Iron Company; this they tendered to defendant.

XVI.—The opinion in *Hecksher* vs. *Edenborn* which received the concurrence of the entire Court of Appeals of New York contains a full discussion of this subject (203 N. Y., pp. 227-30).

XVII.—The defendant entirely misconceives the reason why the law insists upon restoring the

status quo. There is nothing technical about it. It is plain, common honesty and common sense that as long as we ask defendant to pay back all the money he got from us we should be willing to restore him everything we got from him in the transaction. The object of the law requiring a tender is to obviate the necessity of defendant when he has been defeated, suing plaintiff for what he got in the transaction. When the plaintiff tendered the defendant everything he got, that is all that can be asked.

XVIII.—In the Court below counsel for the defendant dwelt upon the hardship to defendant on being compelled to practically buy back plaintiff's stock by paying back the amount paid as subscription, arguing at length as to the consequences that might follow. In *Masson* vs. *Bovet* (1 Denio, 69), the leading case upon this subject, the Court uses some very pertinent language concerning restoring what has been received:

> "This is not exacted, it is said, 'on account "of any feeling of partiality or regard for the "fraudulent party. The law cares very little "what his loss may be and exacts nothing for "his sake. If therefore he has so entangled "himself in the meshes of his own knavish plot "that the party defrauded cannot unloose him, "the fault is his own and the law only requires "the injured party to restore what he has re-"ceived and as far as he can undo what has "been done in the execution of the contract. "This is all that the party defrauded can do, "and all that honesty and fair dealing require "of him. "If these fail to extricate the wrong-"doer from the position he has assumed in the "execution of the contract, it is in no sense "the fault of his intended victim, and upon the "principles of eternal justice, whatever conse-"quences may follow they should rest upon the "head of the offender alone."

FOURTH: HECKSCHER *v.* EDENBORN, 203 N. Y., 210, CORRECTLY DECIDED THAT THE DEFENDANT WAS GUILTY OF CONSTRUCTIVE FRAUD; THAT PLAINTIFF DID AS FAR AS POSSIBLE PUT HIM IN *statu quo* AND THAT IF THERE WAS NOT COMPLETE RESTORATION DEFENDANT'S OWN FRAUD PREVENTED IT, AND HE SHOULD BEAR THE CONSEQUENCES.

Specification No. 3.

I.—The Referee finds (p. 116, fol. 347), that in "1902 *the defendant* in connection with others *conceived a scheme* to consolidate the United States Iron Company and other iron ore properties and erect blast furnaces for smelting iron ore and manufacturing pig iron. Pursuant to such scheme and on or about April 5th, 1902, the *defendant prepared an agreement* dated on that day, which set out the terms of the proposed consolidation, and the defendant invited subscriptions to the capital stock of the proposed new corporation to be formed". He also finds (p. 748, fols. 22, 44) *"thereupon defendant undertook to promote, form and carry out said syndicate and direct and manage the same and act thereunder as the promoter thereof, and the agent and attorney of the several subscribers and each of them* thereto" * * * (p. 749, fol. 2245). These findings accord with the allegations of the complaint on that subject (pp. 34-5, fols. 102-5). It was defendant's scheme, conceived and carried out by him as promoter and syndicate manager, as well as agent and attorney of the subscribers, and it follows he was responsible for the steps taken to consummate the scheme he had conceived, and embodied in the syndicate agreement, and is in no position to urge that because of them he was not put *in statu quo.*

II.—He undoubtedly knew and realized it was complicated; that, as its author, he was responsi-

ble for it, and for its legal consequences, if there was fraud, intentional or unintentional, actual or constructive.

Dickerman v. *Northern Trust Co.*, 176 U. S., 181.

III.—With respect to the decision in *Getty* vs. *Devlin* (54 N. Y., 20), that case is dealt with and distinguished by Judge Hiscock in his opinion in *Heckscher* vs. *Edenborn*, and its inapplicability pointed out.

IV.—The origin of the scheme being fraudulent, it is of no consequence what was done subsequently, the material fact being that the fraud was consummated. Although it seems scarcely possible that at the outset his co-syndicate managers did not know respondent's purpose, the time came when they did know. At all times they owed a duty to the syndicate subscribers, for whom they were acting as agents, and when it came to their knowledge that he was engaged in selling to the syndicate his own property, it was their duty, under penalty of participating in his fraud, to repudiate the transaction. Not having repudiated it, they became equally guilty with him. They lent themselves to respondent's fraudulent scheme. Neither of them was called as a witness; neither offered an explanation; it was the respondent's duty to call them if they could exonerate him and themselves, and every presumption is that they could not, and that their testimony, if it had been forthcoming would have been adverse.

V.—The New York Court of Appeals points out that if any complications or difficulties arose in the way of offering complete restoration of the *status quo* it was due to a situation brought about by Edenborn's fraud in preparing and promoting a syndicate agreement authorizing him to purchase

from himself his own property, and if, upon rescission for his fraud he could not be placed completely *in statu quo,* plaintiff having done everything in his power to do so, the consequences must fall on defendant. The Court says; (p. 227).

> "The only benefit which the defendant "would secure from the agreement thus re- "scinded would be that before recovery of the "moneys paid to him he should be restored to "his original condition as against the acts "which he had performed under the agreement "before rescission. Even this general rule is "not enforced with unvarying strictness, and "among the exceptions to it is a case where "the wrongdoer has so complicated matters as "between him and the party seeking relief that "complete restoration is impossible."

VI.—In thus deciding, the Court followed repeated adjudications in the courts of the State of New York.

Masson vs. *Bovet* (1 Denio, 69).
Hammond vs. *Pennock* (61 N. Y., 145).
Guckenheimer vs. *Angevine* (81 N. Y., 394, at p. 397).
Butler vs. *Prentiss* 158 N. Y., 49).
Moore vs. *Mutual Reserve Fund* (121 App. Div. N. Y., 335).

VII.—The principles of these decisions have received the approval and endorsement of this Court, as well as the courts of several States.

Veazie vs. *Williams* (8 Howard, 134-158).
Neblet vs. *Macfarland* (92 U. S., 101, at p. 105).
Commonwealth vs. *American* (197 F. R., 780, 791).
Perry vs. *Arle* (143 Mass., 540).
O'Shea vs. *Vaughn* (201 Mass., 412).
Paquin vs. *Milliken* (163 Mo., 79).

St. John vs. *Munger* (29 L. R. A., 63).
Van Dyke vs. *Walters* (88 Ill., 444).
Felt vs. *Bell* (205 Ill., 213).
Gatling vs. *Newall* (9 Ind., 572).
Coleson vs. *Smith* (9 Ind., 9).
Downer v. *Smith* (32 Vt., 1).

Kerr on Fraud (at p. 369) says:

"Nor is the inability of a man to rescind a "transaction, as a whole, fatal to his right of "rescission, if his inability to do so is atrrib- "utable to the party against whom he seeks "relief. If the latter has entangled and com- "plicated the transaction in such a manner as "to render it impossible that he should be re- "stored, the party defraudded may, on doing "whatever it is in his power to do, have the "transaction rescinded."

Am. & Eng. Ency., Vol. 24, p. 623.

VIII.—The Circuit Court of Appeals does not notice these decisions and treats the wrongdoer, as to placing him *in statu quo,* as equally innocent with the defrauded party, notwithstanding that complications created by the wrongdoer make complete restoration of the *status quo* impossible. It makes a way of escape for the wrongdoer, by holding that the right to rescind and recover back what is paid is lost, if the wrongdoer can originate an agreement so complicated that, after it is executed, the innocent party cannot put the wrongdoer *in statu quo.* It reverses the long established rule that the wrongdoer who has complicated the transaction must suffer rather than the innocent party, and visits the consequences of the wrong on the innocent rather than on the guilty. Inability to put the wrongdoer completely *in statu quo* may in some instances work a result not perfectly equitable, so far as the wrongdoer is concerned, but the Court of Appeals of New York, following the long-established rule, held that the consequences which follow the fraud should be borne by the one who perpetrated

it, and created the complications which brought about the result. In *Neblet* vs. *Macfarland* (92 U. S., p. 101), this Court held where a similar question was raised that:

> "Parties engaged in a fraudulent attempt "to obtain a neighbor's property are not the "objects of the special solicitude of the "Courts. If they are caught in their own "toils, and are themselves the sufferers, it is "a legitimate consequence of their violation "of the rules of law and morality. Those who "violate these laws must suffer the penalty."

IX.—The decision of the United States Circuit Court of Appeals that it was necessary to a rescission that the defendant, who had himself fraudulently devised and executed a complicated scheme, must be placed *in statu quo,* notwithstanding that he, the wrongdoer, was responsible for the complications preventing it, not only destroys a long-established and salutary rule, but promulgates a new rule, viz., "because of the peculiar situation of the case, no right of rescission exists in favor of one who has been led by fraud into a complicated agreement, which has been fully executed." If the difficulty referred to by the Circuit Court of Appeals in restoring the *status quo* really exists, it is a result of the scheme devised and promoted by defendant for which he is responsible, and the consequences of which he should bear, and not plaintiff and his assignors, who are innocent parties.

FIFTH: THE CIRCUIT COURT OF APPEALS ERRONEOUSLY HELD, AS THE TURNING POINT OF THE CASE, THAT THE TRANSACTION WAS SUCH THAT THE PLAINTIFF COULD NOT PUT DEFENDANT IN STATU QUO, AND THAT IF THERE WAS ANY RIGHT OF RESCISSION IT MUST BE WORKED OUT THROUGH THE COMPANY.

Specification of Errors No. 9.

I.—The Circuit Court of Appeals reached this result by rejecting the decision of the New York

Court of Appeals, and following the decision of an inferior appellate tribunal and approving a minority opinion therein, both of which had been overruled on appeal to the New York Court of Appeals. The language of the Court is:

> "If the syndicate subscribers have any right "of rescission that right must be worked out "through the purchasing company. Moreover "we do not see how even it upon rescission "could restore the defendant to its original "position. It may well happen that because "of the peculiar position of any particular case "no right of rescission exists in favor of one "who has been led by fraud into a complicated "agreement which has been fully executed. We "think this such a case. On the other hand "any profit made by the defendant or any dam- "age sustained by the purchasing company as "a result of this particular fraud, may be re- "covered by it."

II.—Whenever there is the slightest pretext to do so, the point is always raised by the doer of the fraud that the defrauded party has no individual right to enforce, and that whatever right there is must be enforced through the medium of the corporation. Whether rights of subscribers or shareholders must be enforced through the corporation depends on whether the injury is one which affects the *corporate property;* in which case the corporation would be the proper complainant. If, however, it affects the personal rights of individual subscribers, or shareholders, they are entitled to sue individually.

Dewing vs. *Perdicaries* (96 U. S., 193, at p. 196).

Hanchett vs. *Blair* (100 Fed., 817, at p. 824).

Morawetz on Corporations (Secs. 236*a*, 237, 292, 565-7).

Old Dominion Co. vs. *Lewisohn,* 210 U. S., 216.

Davis vs. *Las Ovas Co.*, 227 U. S., 80.
Yeiser vs. *U. S. Paper Co.*, 107 Fed., 340.
Blum vs. *Whitney*, 185 N. Y., 232.

III.—Here there is no question of injury to *corporate property* at all. The wrong was not done to the Sheffield Coal and Iron Co. but the syndicate subscribers, who subscribed in ignorance of the fact that Edenborn was majority owner of and controlled the United States Iron Company, was purchaser as well as seller, and did not intend to pay his subscription in cash but in stock. The United States Iron Co., in which defendant was the majority owner, and the purchase of which was the chief object of the syndicate agreement, never went out of existence, but, as the complaint alleges (p. 40, fol. 113) there was a mere change of name from United States Iron Company to Sheffield Coal & Iron Company, with the stock increased from $1,000,000. to $2,500,000. Defendant's fraud worked a substantial advantage, rather than an injury, to the company, by putting into its treasury the syndicate subscriptions.

IV.—The fraud was not on the corporation, affecting the corporate property, nor on the syndicate subscribers collectively, but was a direct personal wrong on those individual subscribers who made and paid their subscriptions in ignorance of defendant's controlling interest in the United States Iron Company, and of his plan to sell his own property to the syndicate, and pay his subscription, payable in dollars, by transferring to the syndicate his stock in the United States Iron Company.

V.—The principal beneficiary of this transaction was defendant. He owned more than five-ninths of the capital stock of the United States Iron Company, and conceived, prepared, promoted

and carried through the scheme to induce subscriptions to be used to resuscitate, for his benefit, the United States Iron Company, with the result, as the complaint alleges (p. 40, fol. 120) that the Sheffield Coal & Iron Company became insolvent, went into the hands of a receiver, and the stock issued to plaintiffs and their assignors in payment of their subscriptions became worthless.

VI.—The question does not depend upon whether the subscribers are many or few, or whether all of them have been defrauded or not, nor does it depend upon the extent of the fraud perpetrated—whether great or small. The suggestion in the opinion of the Court that "the result of the decision in the New York Court of Appeals would make a manager in a case like this who had sold his own property to a syndicate for $1,000. without disclosing his personal interest, liable for the loss resulting from failure of the entire operation—perhaps $2,500,000." is specious, but not sound. In the first place, we have no such case but, rather, a case where defendant's subscription amounted to one-fifth and, adding to it the stock interest of Elwood and the Williams estate, approaches one-half of the entire amount subscribed. In the second place, if the amount of property transferred by a syndicate manager was infinitesimal compared with the total amount subscribed, it might be proper to take into consideration whether the amount transferred was not so trifling that the subscriber could not have been influenced by the fact, but, in any case, a syndicate manager who takes advantage of his position to dispose of his own property to the syndicate, concealing the fact, is plainly guilty of fraud; and be the property large or small there will be danger in relaxing the rule to any extent. Where shall the line be drawn? But, it is not necessary to consider

these matters, because defendant's fraud in concealing his ownership in and control of the United States Iron Company, and the transfer of his own stock in payment of his subscription was so large a proportion of the enterprise—one-fifth of the whole $2,500,000.—that good faith demanded full and fair disclosure of the facts. Concealment worked serious injury, it being proved and found that the plaintiff and his associates relied upon that full and fair disclosure by defendant which he admits it was his duty to make, and did not make.

SIXTH: THE FACT THAT THE CONTRACT WAS EXECUTED WAS ERRONEOUSLY RELIED ON BY THE CIRCUIT COURT OF APPEALS TO DEFEAT A RECOVERY.

Specification of Error No. 8.

I.—The cases are too numerous to require citation in which executed contracts for the sale or purchase of property, such as stock interests, merchandise, real estate, etc., have been rescinded on the ground of fraud, and judgment rendered for the moneys paid on return of the consideration received. The case of *Pence* vs. *Langdon* (99 U. S., 578), is an instance of this. Just as in this case, the fraud consisted in one individual taking advantage of his relation to another to sell his own stock in a mine, concealing the fact of his ownership. In that case both of the parties treated the contract as fully executed, and it was not until the vendee of the stock visited the mine at the invitation of the vendor after the stock had been sold and paid for, that the fraud was discovered, whereupon the vendee immediately gave notice of rescission and demanded the return of the amount paid. The case is in many respects similar to ours and is a

direct authority to the effect that where fraud is established, whether in equity for a rescission, or in a common law action founded on prior rescission, the Court will in the one case grant relief, and in the other give judgment for a return of the amount paid.

Carr v. *National Bank & Loan Co.*, 167 N. Y., 375; *aff'd on writ of error*, 189 U. S., 426.

Turner v. *Ward*, 154 U. S., 618.

Burton v. *Driggs*, 20 Wall, 125.

Smith vs. *Richards*, 13 Pet., 26.

Canadian Co. vs. *Assets Co.*, App. D., , N. Y.

II.—In the *Hecksher* case, at page 222, it is said:

> "It must be quite as elementary and true "that if one by misrepresentation or suppres- "sion of facts when he ought to speak, in- "duces another ignorantly to make a con- "tract appointing the first his agent and con- "ferring upon him discretionary power to "purchase his own property, the contract is "voidable and *even if executed* may be re- "scinded and the money recovered back on "restoration of what has been received."

The rule is thus stated in *American and English Encyclopedia of Law*, vol. 24, p. 613:

> "Yet where it clearly appears that the "party against whom rescission is sought "was guilty of fraud, misrepresentation, or "deceit, or of some other wrong of equal "force in vitiating the contract, the circum- "stance that the contract has been fully and "voluntarily performed before discovery of "the facts giving rise to the right of rescis- "sion, will not operate to prevent the court "from granting relief; under such circum- "stances the right to rescind is none the less "available after full performance of the con- "tract than before; provided, of course, that

"the other party seeking relief has not by his "conduct waived the right, that the other party "can be put *in statu quo,* and that no adverse "rghts of third persons have intervened."

Bigelow on Fraud (p. 430) says:

"Indeed the fact that parties cannot be put "precisely *in statu quo* in regard to the sub- "ject-matter of the transaction will not be a "valid ground of objection to rescission. If "it were, *an executed contract could never be "rescinded,* for the parties never could be "placed thus in regard to time or in regard "to the use of the property. Some period of "time must elapse before rescission is pos- "sible, and some use of the property will "generally be necessary to a discovery of the "wrong. All that can be required in a case of "an executed contract is that the injured party "should restore whatever of value has been re- "ceived and *so far as the nature of things will "permit* undo what has been done."

III.—Defendant's answer did not deny the allegation of the complaint which the Referee found as a fact, that it was his duty to make to the subscribers full and complete disclosure of his interest in the United States Iron Company, of his stockholdings therein, and of any other interest which he had in said Company, and in the proposed scheme provided for in the syndicate agreement, and to give to the subscribers, and each of them, as full information as the defendant possessed relating to said subscription, and of any fact which would affect their interest or the interest of any or either of them.

IV.—The complaint alleged, and the Referee has found, that he concealed from plaintiff his ownership of a majority of the stock of the United States Iron Company, and while acting as syndicate manager, and agent and attorney of the syndi-

cate subscribers, was engaged in procuring the sale of his own property from himself to himself as syndicate manager, and that having made a subscription of $500,000. payable in cash to the syndicate, he did not intend to pay in cash, but by his stock in the United States Iron Company, paying only sufficient cash to make up any deficiency.

Tyler vs. *Savage*, 143 U. S., 79, at page 98, says:

> "This suppression of a material fact which "Tyler was bound in good faith to disclose, "was equivalent to a false representation."
>
> *Crosby* vs. *Buchanan*, 23 Wall, 420, at p. 457.
>
> *Cleveland* vs. *Richardson*, 132 U. S., 318.
>
> *Stewart* vs. *Wyoming*, 128 U. S., 383, at p. 388.

V.—These frauds were clearly proved and not denied; plaintiffs were deceived and influenced thereby and they presented a plain case for invoking, if it had been necessary, the power of a Court of equity to cancel an executed contract.

> *Atlantic Delaine Co.* vs. *James*, 94 U. S., 207.
>
> *Union R. Co.* vs. *Dull*, 124 U. S., 173.
>
> *Maxwell Land Grant case*, 121 U. S., 325.

VI.—All the authorities and text books proceed upon the theory that a fully executed contract may be rescinded for fraud, conditioned only upon the fraud being clearly proved, and upon the defrauded party doing everything in his power to put the wrongdoer *in statu quo*. Fraud, when proved, vitiates every transaction, and the remedy by rescission was particularly designed, and is especially appropriate, to annul executed contracts. It may not be possible, notwithstanding fraud is established, to put the wrongdoer completely *in statu quo*, but that this is not a valid objection is well

stated in the passage above quoted from Bigelow on Fraud.

In *Neblett* v. *Macfarland* (92 U. S., 101, at p. 103), this Court said:

> "The Court proceeds on the principle, that, "as the transaction ought never to have taken "place, the parties are to be placed *as far as "possible* in the situation in which they would "have stood if there had never been any such "transaction."

SEVENTH: ATTENTION SHOULD BE CALLED TO THE EXTRAORDINARY CHARACTER OF DEFENDANT'S ASSIGNMENTS OF ERROR.

Specification of Error No. 7.

I.—*They extend from page 787 of the Record to and including page 850, sixty-four pages in all, embracing 224 assignments.* Rule II of the Circuit Court of Appeals requires that the assignments of error "set out separately and particularly each error intended to be urged". This is essential to the allowance of a Writ of Error.

Rowe vs. *Phelps* (152 U. S., 87).

II.—General assignments, such as these, which do not set out "separately and particularly" the error intended to be raised are insufficient. There must be something specific.

Lucas vs. *Brooks* (18 Wall, 436, at p. 456).

Scholey vs. *Rew* (23 Wall, 331, at p. 345).

Van Stone vs. *Stillwell* (142 U. S., 128, at p. 133).

Grand Trunk vs. *Ives* (144 U. S., 408, at p. 418).

III.—These assignments—two hundred and twenty-four in number—were nothing more or less than a perversion of the rule relating thereto.

In *Phillips* vs. *Seymour* (91 U. S., 648), Mr. Justice Miller said:

> "In this Court plaintiff in error by one "counsel files 45 assignments of error and by "another 7 more making 52 in all.
>
> "The object of the rule requiring an assign- "ment of error is to enable the Court and op- "posing counsel to see on what point the "plaintiff's counsel intends to ask a reversal "of the judgment and to limit the discussion "to those points. This practice of unlimited "assignments is a perversion of the rule de- "feating all its purposes, bewildering the "counsel of the other side and leaving the "Court to gather from a brief often as prolix "as the assignments of error, which of the "latter are really relied on."

IV.—It is true that the Court may notice "a plain error not assigned", but we submit that the point upon which the judgment was reversed was far from being a "plain error", and should not have been entertained in the absence of an assignment of error, pointing it out "separately and particularly".

V.—We respectfully call the attention of the Court to two points:

(1) It is not assigned as error that the facts stated in the complaint, nor (2) that the facts found by the Referee, did not support the judgment rendered.

VI.—There are 224 assignments of errors and not one of them assigns error in either of these re-

spects. Inasmuch as respondent was so minute in specifying errors as to specify 224 no special indulgence is called for in his omission to assign the errors upon which he now relies.

VII.—With respect to the first eight assignments of errors (pp. 787-9, fols. 2359-2365) they relate to the sufficiency of the complaint, with the exception of those dealing with an alleged defect of parties and an improper joinder of causes of action. They are of the most general character and specify nothing with particularity. This has been frequently held to be contrary to the office of an assignment of errors and to the rules laid down concerning them. To meet these points respondent's counsel calls attention to certain cases in this Court, but none of them have any bearing, as this question was not raised, while in the case of *Chicago* vs. *Clark* (178 U. S., 353) error was assigned that the findings did not support the judgment. This subject is considered by this Court in *Behn* vs. *Campbell* (205 U. S., 483), from which it appears that while errors not stated in the assignments of errors have sometimes been considered, the limit of this practice is accurately stated in the 35th rule of the Court, and that errors not assigned will be disregarded except that the Court at its own option may notice a plain error not assigned, and that the Court will not be astute in selecting statements of law and subjecting them to minute scrutiny where, on the whole, it is clear that the facts found by the Court justify the judgment which it rendered.

VII.—If the assignment of such a multitude of errors is, as has been said, "a perversion of the rule," we submit that where counsel have taken

pains to search the record for every conceivable error and assign it, the omission to assign with particularity what he claims is the principal error in the case and what he is pleased now to call "plain error not assigned" ought to prevent a consideration of such errors not assigned. The errors not assigned which he would have this Court consider are not, we believe, in any sense "plain errors"; they are, at most, doubtful and questionable errors and, in fact, not errors at all. We think that the Circuit Court of Appeals was not justified, in the absence of proper assignments of errors in the respects referred to, in disposing of the case upon errors not assigned.

Briscoe v. *District of Col.*, 221 U. S. 547.
Pickett v. *U. S.*, 216 U. S. 456.
Foster Fed. Pr., Vol. III, p. 2473.

EIGHTH: THE "NARRATIVE OF PROCEEDINGS BEFORE THE REFEREE" AND THE SUBSEQUENT PROCEEDINGS BEFORE HIM ARE NOT PROPERLY BEFORE THIS COURT.

I.—No bill of exceptions was allowed, but the District Judge allowed them to be filed but not as a bill of exceptions (see pp. 716-854), and the Clerk of the Court included them in the return to the Circuit Court of Appeals. A motion was made before that Court to strike them from the record, but that Court allowed them to remain reserving the question of striking out until the argument (p. 860). When the judgment was reversed the question of striking out was not passed upon. When the writ of certiorari was granted by this Court, the Clerk of the Circuit Court of Appeals certified them as a part of the papers on file in the Circuit Court of Appeals, but they are not, we submit, a part of

the record properly before the Court of Appeals nor entitled to be considered by this Court.

England v. *Gebhardt*, 112 U. S. 502.
Sire v. *Ellithorp*, 137 U. S. 579.
Duncan v. *Atchison*, 72 F. R. 808.

NINTH: THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS SHOULD BE REVERSED, AND THAT OF THE DISTRICT COURT ENTERED UPON THE REPORT OF THE REFEREE SHOULD BE AFFIRMED.

THERON G. STRONG,
Of Counsel for Petitioner,
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N. Y.

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BRIEF OF PETITIONER.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 262. [redacted] 9

THOMAS P. ALDER, PETITIONER,

vs.

WILLIAM EDENBORN.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

THERON G. STRONG,
Of Counsel for Petitioner,
49 Wall Street,
New York City.

The Evening Post Job Printing Office, 156 Fulton St., N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 262.

THOMAS P. ALDER,
Petitioner,

vs.

WILLIAM EDENBORN,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

STATEMENT OF THE CASE.

The writ was granted to review a judgment of the United States Circuit Court of Appeals for the Second Circuit reversing a judgment of the United States District Court for the Eastern District of New York, in favor of the plaintiff entered upon the report of a Referee, appointed pursuant to a written stipulation waiving a jury trial (pp. 75–7, fols. 223–131).

For a statement of the essential facts of the case, the petitioner respectfully refers the Court to the statement of the case contained in the brief in the case of *Sim* vs. *Edenborn* submitted herewith.

Assignment of Errors and Specification of Errors Relied On.

1. The Circuit Court of Appeals erred in reversing the judgment herein, inasmuch as proper deference and respect for the decision of the New York Court of Appeals in *Hecksher* vs. *Edenborn* (203 N. Y., 210), should have led the Circuit Court of Appeals to lean toward following the said decision of the New York Court of Appeals.

2. The Circuit Court of Appeals having held that no conclusion can be reached with confidence, erred in reversing the judgment herein, and in refusing to follow said decision of the New York Court of Appeals, accepting that of the Appellate Division of the Supreme Court in *Hecksher* vs. *Edenborn* (131 App. Div., 253), especially for the reasons expressed by Justice Miller at page 266, notwithstanding that said decision of said Appellate Division had been reversed by the Court of Appeals and said opinion was a minority opinion overruled by the New York Court of Appeals.

3. The Circuit Court of Appeals erred in reversing the judgment upon the ground that the complaint failed to show that the defendant was put *in statu quo* inasmuch as it appears upon the facts stated in the complaint and found by the Referee that if defendant was not put *in statu quo*, his own wrongful acts had so complicated the transaction complained of as to prevent plaintiff and his assignors from doing so.

4. The Circuit Court of Appeals having decided that the findings of the Referee were binding upon it, and support the judgment rendered, erred in reversing the said judgment holding that the complaint failed to state a cause of action because a consideration of the syndicate agreement satisfied it that the defendant could not be restored to his original position.

5. The Circuit Court of Appeals erred in reversing the judgment on the ground that the complaint failed to show that the defendant was put *in statu quo* inasmuch as on the facts stated in the complaint plaintiffs and their assignore did, as far as possible, place him *in statu quo* by tendering to him all that they had received from him.

6. The Circuit Court of Appeals erred in reversing the judgment on the ground that the complaint failed to show that the defendant was put *in statu quo* inasmuch as there was no assignment of error by the defendant (plaintiff in error below), specifying as a ground of error that the defendant was not put *in statu quo*, and the point was not raised at the trial.

7. That the assignments of error set forth in the record on page 781 to 850, inclusive, are a perversion of the rule relating thereto, and insufficient to raise for review the alleged errors upon which the Circuit Court of Appeals reversed the judgment herein.

8. The Court erred in reversing the judgment herein on the ground that "because of the peculiar situation of any particular case no right of rescission exists in favor of one who has been led by fraud into a complicated agreement which has been fully executed", and "that this is such a case", inasmuch as fraud will, if it is acted upon promptly when discovered, be a ground for rescinding an executed contract.

9. The Court erred in reversing the judgment on the ground that "if the syndicate subscribers have any right of rescission, that right must be worked out through the purchasing company," inasmuch as the wrong and injury complained of was done to syndicate subscribers individually and personally, and was not a wrong and injury to corporate property, which must be redressed through the company.

BRIEF OF THE ARGUMENT.

FIRST: ALDER'S CASE DIFFERS ONLY IN UNIMPORTANT DETAILS FROM THAT OF SIM AND HIS ASSIGNORS, AND PRESENTS THE SAME QUESTIONS.

I.—The Circuit Court of Appeals held that the Referee's findings support the judgment (p. 178).

II.—The referee in his report (p. 58, fol. 172) finds in accordance with the allegations of the complaint as follows:

(1) Edenborn's ownership and control of the United States Iron Company (p. 20, fol. 59; p. 59, fol. 175).

(2) His preparation of the syndicate agreement (p. 18, fol. 53; p. 50, fol. 170).

(3) His conversation with Alder about his subscription is detailed in his report (pp. 59, 60, fols. 177-8), and as requested by petitioner (p. 95, fol. 285) as follows:

> 7. "Thereafter and on or about June 1, "1902, the defendant requested plaintiff to "subscribe to said Syndicate agreement, "and represented and stated to the plaintiff "that it was proposed under said Syndicate "to purchase only valuable and paying "properties; that each subscription was "payable in dollars and not in property; "that he had made a subscription for $500,- "000 payable in dollars and not in property; "that the enterprise was being organized in "good faith; that each of the subscribers "according to their interest had equal "rights and stood on the same basis; that "every man's dollar, was put up against "every other man's dollar, and that there "were to be no special advantages to any

"one; and such representations and state-
"ments were made to the said plaintiff to
"induce him to become a subscriber to
"said Syndicate."

III.—The Referee finds that Alder did not at once subscribe, but that after subscription for all the stock had been made, he requested Edenborn to procure him some of the subscribed stock, which the defendant undertook to do. The Referee details in his finding Number 8 (fols. 286–7), as requested by plaintiff, what had taken place in the meantime between the parties on various occasions as follows (p. 96, fol. 286):

8. "That the defendant on various occa-
"sions between said April 15th, 1902, and
"December 6th, 1902, repeated and reiterated
"said statements and each of them to the
"plaintiff, and in addition thereto repre-
"sented and stated, that plaintiff by not sub-
"scribing thereto would miss the opportunity
"of a lifetime; that the said properties were
"earning dividends before anything was
"completed, and the said stock was earning
"so much that the plaintiff could put the
"stock away and forget that he had paid for
"it, and that $136.08 was due for interest on
"account of deferred payment of said sub-
"scription to said Syndicate agreement, and
"thereupon plaintiff consented to become
"and became and was accepted by defendant
"as a subscriber thereto."

IV.—The Referee also finds that Edenborn subsequently procured from Elwood a Syndicate subscriber, a part of his subscription, and thereafter procured the stock and delivered 100 shares thereof to Alder, for which the latter paid the subscription price of $10,000, to which was added the sum of $136.08 for interest to place Alder upon the same footing, as to cost, with those who actually subscribed the Syndicate agreement (fol. 178), and that

Edenborn knew, and it was then arranged, that Alder was to get the stock upon the same terms and conditions as he would have received the same had he subscribed to the Syndicate agreement (p. 69, fol. 179).

V.—The Referee then finds as follows:

> "FIFTH: At the time of the conversation "between the plaintiff and the defendant, "leading up to the procurement and delivery "of the stock to the plaintiff, the defendant "knew and it was then arranged that the "plaintiff was to get such stock upon the "same terms and conditions as he would have "received the same had he subscribed to the "said Syndicate agreement (p. 60, fol. 179).
>
> "SIXTH: The defendent understood when "he obtaiaed the right to deliver the stock "from Elwood's subscription to capital stock "that the same would be delivered to the "plaintiff upon the same terms and condi- "tions as though the plaintiff had made an "original subscription to the Syndicate agree- "ment for the same shares of stock" (p. 60 fol. 179).

VI.—The allegation of defendants' duty to disclose to the plaintiff (p. 109, fol. 14) is not denied and is found by the Referee (p. 61, fol. 181; p. 109, fol. 327) as well as the failure to disclose (fol. 180), and that such failure to make disclosure operated in law as a fraud upon the plaintiff (p. 60, fol. 185) which entitled the plaintiff to rescind and recover from Edenborn the amount paid by him.

VII.—The Referee makes the same findings as in the Sim case respecting Edenborn's, Elwood's and the Williams Estate's subscriptions and that they at no time intended to pay the same except by stock of the United States Iron Company and whatever cash was needed in addition to make the ful

amounts of said subscriptions, which they did (pp. 98-9, fols. 294, 296) and of which Edenborn kept Alder in ignorance (pp. 99-100, fols. 297-9).

VIII.—When Edenborn used his powers of persuasion to induce Alder to become a subscriber to the Syndicate and Alder in reliance on his statements requested him to procure $10,000 of the subscription and Edenborn undertook so to do upon the same terms as other subscribers, he undertook to act as Alder's agent and acted as such in procuring it, and when Edenborn being a Syndicate manager accepted Alder as a subscriber to the Syndicate agreement he undertook to act and acted as Alder's agent and attorney under the Syndicate agreement. He thus occupied a double relation of trust and confidence, which required from him the utmost good faith, and full and complete disclosure of all facts which would affect Alder's interest in the transaction.

IX.—The Referee not only finds that Alder consented to become and became and was accepted by Edenborn as a subscriber to the Syndicate (p. 96, fol. 287), but the answer alleges this fact in substance (p. 31, fol. 93), and Alder's name is on the list of subscribers annexed to the answer, showing that Edenborn treated him as one of the subscribers (p. 54, fol. 162).

X.—The transaction amounnted to nothing more or less than an agent inducing his principal to become one of a number of individuals to purchase the agent's property, the agent concealing his ownership from the principal.

XI.—All of the cases referred to in the brief in *Sim* v. *Edenborn* apply with equal force to the case of Alder, especially those in which it is held that where one occupying a fiduciary relation possesses

a personal interest in a transaction, with knowledge of material facts, and induces his principal to enter into the transaction without making full and complete disclosure, is liable as for fraud in law, irrespective of whether there was any motive to deceive or any intent to conceal.

XII.—There was in fact no claim nor any request to find that Alder knew any of the facts relating to Edenborn's ownership and control of the United States Iron Company, or that there was no intention on the part of Edenborn, Elwood and the Williams estate to pay their subscriptions in dollars, but largely in stock of the United States Iron Company.

SECOND: THE PETITIONER SUBMITS TO THE COURT HEREWITH HIS BRIEF OF THE ARGUMENT IN THE CASE OF *Sim* VS. *Edenborn*, THE QUESTIONS DISCUSSED THEREIN BEING INVOLVED IN AND CONTROLLING THIS CASE.

THIRD: THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS SHOULD BE REVERSED, AND THAT OF THE DISTRICT COURT ENTERED UPON THE REPORT OF THE REFEREE SHOULD BE AFFIRMED.

THERON G. STRONG,
Of Counsel for Petitioner,
49 Wall Street,
New York, N. Y.

(7290P)

Supreme Court of the United States.

OCTOBER TERM, 1916.

No. 9.

THOMAS P. ALDER,
Petitioner,

vs.

WILLIAM EDENBORN,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

STATEMENT OF THE CASE.

The writ was granted to review a judgment of the United States Circuit Court of Appeals for the Second Circuit reversing a judgment of the United States District Court for the Eastern District of New York, in favor of the plaintiff entered upon the report of a Referee, appointed pursuant to a written stipulation waiving a jury trial (pp. 75-7, fols. 223-131).

For a statement of the essential facts of the case, the petitioner respectfully refers the Court to the statement of the case contained in the brief in the case of *Sim* vs. *Edenborn* submitted herewith.

ASSIGNMENT OF ERRORS AND SPECIFICATION OF ERRORS RELIED ON.

1. The Circuit Court of Appeals erred in reversing the judgment herein, inasmuch as proper

deference and respect for the decision of the New York Court of Appeals in *Hecksher* vs. *Edenborn* (203 N. Y., 210), should have led the Circuit Court of Appeals to lean toward following the said decision of the New York Court of Appeals.

2. The Circuit Court of Appeals having held that no conclusion can be reached with confidence, erred in reversing the judgment herein, and in refusing to follow said decision of the New York Court of Appeals, accepting that of the Appellate Division of the Supreme Court in *Hecksher* vs. *Edenborn* (131 App. Div., 253), especially for the reasons expressed by Justice Miller at page 266, notwithstanding that said decision of said Appellate Division had been reversed by the Court of Appeals and said opinion was a minority opinion overruled by the New York Court of Appeals.

3. The Circuit Court of Appeals erred in reversing the judgment upon the ground that the complaint failed to show that the defendant was put *in statu quo* inasmuch as it appears upon the facts stated in the complaint and found by the Referee that if defendant was not put *in statu quo,* his own wrongful acts had so complicated the transaction complained of as to prevent plaintiff and his assignors from doing so.

4. The Circuit Court of Appeals having decided that the findings of the Referee were binding upon it, and support the judgment rendered, erred in reversing the said judgment holding that the complaint failed to state a cause of action because a consideration of the syndicate agreement satisfied it that the defendant could not be restored to his original position.

5. The Circuit Court of Appeals erred in reversing the judgment on the ground that the complaint failed to show that the defendant was put *in statu*

quo inasmuch as on the facts stated in the complaint plaintiffs and their assignors did, as far as possible, place him *in statu quo* by tendering to him all that they had received from him.

6. The Circuit Court of Appeals erred in reversing the judgment on the ground that the complaint failed to show that the defendant was put *in statu quo* inasmuch as there was no assignment of error by the defendant (plaintiff in error below) specifying as a ground of error that the defendant was not put *in statu quo,* and the point was not raised at the trial.

7. That the assignments of error set forth in the record on page 781 to 850, inclusive, are a perversion of the rule relating thereto, and insufficient to raise for review the alleged errors upon which the Circuit Court of Appeals reversed the judgment herein.

8. The Court erred in reversing the judgment herein on the ground that "because of the peculiar situation of any particular case no right of rescission exists in favor of one who has been led by fraud into a complicated agreement which has been fully executed", and "that this is such a case", inasmuch as fraud will, if it is acted upon promptly when discovered, be a ground for rescinding an executed contract.

9. The Court erred in reversing the judgment on the ground that "if the syndicate subscribers have any right of rescission, that right must be worked out through the purchasing company," inasmuch as the wrong and injury complained of was done to syndicate subscribers individually and personally, and was not a wrong and injury to corporate property, which must be redressed through the company.

BRIEF OF THE ARGUMENT.

FIRST: ALDER'S CASE DIFFERS ONLY IN UNIMPORTANT DETAILS FROM THAT OF SIM AND HIS ASSIGNORS, AND PRESENTS THE SAME QUESTIONS.

I.—The Circuit Court of Appeals held that the Referee's findings support the judgment (p. 178).

II.—The referee in his report (p. 58, fol. 172) finds in accordance with the allegations of the complaint as follows:

(1) Edenborn's ownership and control of the United States Iron Company (p. 20, fol. 59; p. 59, fol. 175).

(2) His preparation of the syndicate agreement (p. 18, fol. 53; p. 50, fol. 170).

(3) His conversation with Alder about his subscription is detailed in his report (pp. 59, 60, fols. 177-8) as follows:

> 7. "Thereafter and on or about June 1, "1902, the defendant requested plaintiff to sub- "scribe to said Syndicate agreement, and rep- "resented and stated to the plaintiff that it was "proposed under said Syndicate to purchase "only valuable and paying properties; that "each subscription was payable in dollars and "not in property; that he had made a subscrip- "tion for $500,000 payable in dollars and not "in property; that the enterprise was being "organized in good faith; that each of the sub- "scribers according to their interest had equal "rights and stood on the same basis; that every "man's dollar, was put up against every other "man's dollar, and that there were to be no "special advantages to any one; and such rep- "resentations and statements were made to the "said plaintiff to induce him to become a sub- "scriber to said Syndicate."

III.—The Referee finds that Alder did not at once subscribe, but that after subscription for all the stock had been made, he requested Edenborn to procure him some of the subscribed stock, which the defendant undertook to do.

IV.—The Referee also finds that Edenborn subsequently procured from Elwood a Syndicate subscriber, a part of his subscription, and thereafter procured the stock and delivered 100 shares thereof to Alder, for which the latter paid the subscription price of $10,000, to which was added the sum of $136.08 for interest to place Alder upon the same footing, as to cost, with those who actually subscribed the Syndicate agreement (fol. 178), and that Edenborn knew, and it was then arranged, that Alder was to get the stock upon the same terms and conditions as he would have received the same had he subscribed to the Syndicate agreement (p. 60, fol. 179).

V.—The Referee finds as follows:

"FIFTH: At the time of the conversation "between the plaintiff and the defendant, "leading up to the procurement and delivery "of the stock to the plaintiff, the defendant "knew and it was then arranged that the "plaintiff was to get such stock upon the same "terms and conditions as he would have re- "ceived the same had he subscribed to the said "Syndicate agreement (p. 60, fol. 179).

"SIXTH: The defendant understood when "he obtained the right to deliver the stock "from Elwood's subscription to capital stock "that the same would be delivered to the "plaintiff upon the same terms and conditions "as though the plaintiff had made an original "subscription to the Syndicate agreement for "the same shares of stock" (p. 60, fol. 179).

VI.—The allegation of defendant's duty to disclose to the plaintiff (p. 5, fol. 14) is not denied

and is found by the Referee (p. 61, fol. 181; p. 109, fol. 327) as well as the failure to disclose (fol. 180), and that such failure to make disclosure operated in law as a fraud upon the plaintiff (p. 60, fol. 185) which entitled the plaintiff to rescind and recover from Edenborn the amount paid by him.

VII.—When Edenborn used his powers of persuasion to induce Alder to become a subscriber to the Syndicate and Alder in reliance on his statements requested him to procure $10,000 of the subscription and Edenborn undertook so to do upon the same terms as other subscribers, he undertook to act as Alder's agent and acted as such in procuring it, and when Edenborn being a Syndicate manager accepted Alder as a subscriber to the Syndicate agreement he undertook to act and acted as Alder's agent and attorney under the Syndicate agreement. He thus occupied a double relation of trust and confidence, which required from him the utmost good faith, and full and complete disclosure of all facts which would affect Alder's interest in the transaction.

VIII.—Alder consented to become, and became, and was accepted by Edenborn as a subscriber to the Syndicate, and Alder's name is on the list of subscribers annexed to the answer, showing that Edenborn treated him as one of the subscribers (p. 54, fol. 162).

IX.—The transaction amounted to nothing more or less than an agent inducing his principal to become one of a number of individuals to purchase the agent's property, the agent concealing his ownership from the principal.

X.—All of the cases referred to in the brief in *Sim* v. *Edenborn* apply with equal force to the case

of Alder, especially those in which it is held that where one occupying a fiduciary relation possesses a personal interest in a transaction, with knowledge of material facts, and induces his principal to enter into the transaction without making full and complete disclosure, is liable as for fraud in law, irrespective of whether there was any motive to deceive or any intent to conceal.

XI.—There was in fact no claim that Alder knew any of the facts relating to Edenborn's ownership and control of the United States Iron Company, or that there was no intention on the part of Edenborn to pay his subscription in dollars, but largely in stock of the United States Iron Company.

SECOND: THE PETITIONER SUBMITS TO THE COURT HEREWITH HIS BRIEF OF THE ARGUMENT IN THE CASE OF *Sim* VS. *Edenborn*, THE QUESTIONS DISCUSSED THEREIN BEING INVOLVED IN AND CONTROLLING THIS CASE.

THIRD: THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS SHOULD BE REVERSED, AND THAT OF THE DISTRICT COURT ENTERED UPON THE REPORT OF THE REFEREE SHOULD BE AFFIRMED.

THERON G. STRONG,
Of Counsel for Petitioner,
49 Wall Street,
New York, N. Y.

Supreme Court of the United States

OCTOBER TERM, 1954

No. [redacted]

JAMES SIM,

Petitioner,

versus

WILLIAM SEMENDORN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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Of Counsel.

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Supreme Court of the United States,

OCTOBER TERM, 1914,

No. 261.

JAMES SIM,
Petitioner,

against

WILLIAM EDENBORN,
Respondent.

Brief for Respondent.

Statement of the Case.

This case comes here on a writ of certiorari to the United States Circuit Court of Appeals for the second circuit granted September 27, 1913 (Transcript p. 865), to review the judgment of the Circuit Court of Appeals entered on July 7, 1913 (Tr. p. 863) reversing a judgment of the United States District Court for the Eastern District of New York in favor of petitioner entered upon the report of a referee appointed under a stipulation waiving a trial by jury (Tr., fols. 338-402).

The action is at law to recover certain sums of money claimed to have been obtained from petitioner and his assignors by respondent's fraud

in procuring their signatures to a syndicate agreement; it was commenced in the Supreme Court of Kings County in the State of New York, and afterwards removed to the United States Circuit Court for the Eastern District of New York on the ground of diverse citizenship.

The complaint alleges that from the 15th day of April, 1902, until the 1st day of January, 1903, defendant (respondent) was engaged in promoting, forming and carrying out a syndicate agreement to purchase, develop and dispose of certain lands and properties and for the purchase of the United States Iron Company of New Jersey, capitalized at $1,000,000 and its properties, and for this purpose prepared a syndicate agreement, appointing defendant and J. C. Walker and August Mann syndicate managers; (this syndicate agreement is set out at folio 301 of the transcript); that the defendant submitted same to the subscribers thereto and procured their subscriptions to the same; that under the syndicate agreement the defendant occupied a relation of trust and confidence to the subscribers and it was his duty to make to them a full disclosure of all the facts and circumstances within his knowledge necessary to enable the subscribers to form an independent judgment and to protect their interests; that plaintiff, one of the subscribers, had unlimited confidence in and relied on and trusted defendant to the fullest extent (fol. 14); it was further alleged that, as an inducement to plaintiff to subscribe, defendant by the terms of the said syndicate agreement represented and stated to the subscribers that an opportunity was afforded to acquire for a cash consideration the ownership, control and possession of the United States Iron Company of New Jersey, capitalized at $1,000,000, and that at the time the defendant

induced plaintiff to subscribe to said syndicate agreement defendant owned 5365 out of a total of 9250 shares of the capital stock of said United States Iron Company then outstanding, and, intending to deceive and defraud plaintiff and other subscribers, concealed from them the fact that he owned a majority of the capital stock of the said company and controlled it (fol. 17-18); that the plaintiff paid to the syndicate managers the amount due on his subscription in installments between July 20, 1902 and December 20, 1902 and received certificates of stock of the par value of $100 each in the Sheffield Coal and Iron Company (fols. 22-23); it is further alleged in the complaint that after procuring the execution of the syndicate agreement by the subscribers, defendant caused the name of the United States Iron Company to be changed to that of the Sheffield Coal and Iron Company and the stock to be increased and called upon the plaintiff for the payment of his subscription which plaintiff paid as aforesaid, and on or about January 1st, 1903, defendant delivered to plaintiff said certificates of stock in the Sheffield Coal & Iron Company (fols. 26-27); that the plaintiff, after the discovery of the fraud, deceit and fraudulent concealment practiced on him by defendant, notified the syndicate managers, including the defendant, that he elected to rescind his subscription to said agreement and offered to return the said certificates of stock to the defendant and demanded of defendant payment of the money which had been paid to defendant on the subscription agreement, which demand was refused; that plaintiff was ready and willing to deliver said certificates and receive back the money paid defendant (fols. 27-28); the second and third causes of action set out

in the complaint are based on allegations of substantially the same fraudulent acts on the part of the defendant in inducing the subscribers Cluff and Coles to sign the same syndicate agreement. The fourth cause of action is based on substantially the same claims of fraudulent representations and concealment practiced by defendant on Elmer E. Stone, which caused said Stone to authorize a subscription of $5,000 to the syndicate agreement (fol. 350).

A demurrer to the complaint (fol. 75) was sustained on the ground that the complaint constituted an equitable action involving the rescission of the agreement with the other subscribers to the syndicate while apparently setting forth a demand for a tort, and on the further ground that the complaint did not state facts sufficient to constitute a cause of action and that there was a defect of parties because the other syndicate managers and the Sheffield Coal & Iron Company were not made parties (fol. 94). Thereupon plaintiff amended his complaint, but the only substantial change made was the addition of the paragraph stating that the stock of the Sheffield Coal & Iron Company was worthless (fol. 162); the defendant demurred to the amended complaint and the same judge who passed on the first demurrer held that the complaint stated a cause of action at law based on a rescission of the contract and overruled the demurrer. A decision was entered which provided: (1) that the complaint stated facts sufficient to constitute a cause of action; (2) that there was no defect of parties defendant and (3) that the complaint stated a cause of action at common law, based on a rescission of the contract alleged to have been procured by fraud (fol. 177). Interlocutory judgment was entered overruling the demurrer (fol. 69).

The defendant in his answer (fol. 85) denied the material allegations of the complaint, except that defendant admitted the execution of the syndicate agreement which was annexed to the answer as an exhibit (fol. 301).

The parties by stipulation referred the issues of law and of fact to Edward W. Hatch, referee, to hear and determine and an order was accordingly entered (fols. 338-342). After a trial the referee made a report finding that defendant solicited plaintiff and his assignors to become subscribers to the syndicate agreement which authorized and contemplated the purchase of the stock of the United States Iron Company and other properties by the managers of the syndicate (fol. 347); that defendant did not disclose to them at or prior to the signing of said syndicate agreement his interest in the United States Iron Company (fols. 348-349); that they signed the agreement in ignorance of defendant's interest in said corporation (fol. 350); that it was defendant's duty to make a full and complete disclosure of his interest in the United States Iron Company (fol. 351); that upon the discovery of his interest in said corporation the plaintiff and his assignors elected to rescind their subscriptions and gave notice of such fact to the syndicate managers and offered to return and restore the stock which each had received and demanded the return of the money paid therefor (fol. 352); that defendant and the syndicate managers refused to accept the stock and return the money (fol. 353); the referee also found that at the time of the formation of the syndicate, the United States Iron Company was the owner of valuable iron properties in and about Sheffield, Alabama (fol. 2153); that defendant made no statements to the plaintiff and his assignors with intent to deceive, defraud or

mislead (fol. 2158); that defendant had not intentionally concealed his interest in the United States Iron Company or his ownership of stock from plaintiff and his assignors (fols. 2163, 2164, 2172, 2179, 2184, 2188, 2193); also found that no statement or action of the defendant was made for the purpose of leading the plaintiff or his assignors to believe that the defendant was not interested in said property or stock (fol. 2163). He further found that the plaintiff herein and each of his assignors knew that the defendant was largely interested in the formation of the syndicate and the carrying out of its objects and purposes and was devoting considerable time thereto (fol. 2164); he further found that at a meeting of the stockholders of the Sheffield Coal & Iron Company held on June 9, 1903, the minutes of the annual meeting of the stockholders of the United States Iron Company held on June 10, 1902 were read and approved and that at this last named meeting the plaintiff Sim and his assignor Cluff were present in person and his assignors Coles and Stone were represented by proxy (fol. 2167); he further found that the minutes of the meeting of the stockholders of the United States Iron Company held on June 10, 1902 which were read and approved at said meeting of the stockholders of the Sheffield Coal & Iron Company held on June 9, 1903 showed the defendant's ownership of the stock of the United States Iron Company and the extent thereof (fol. 2169); he further found that at the time of the formation of said syndicate, the United States Iron Company was the owner of valuable iron ore property in and about Sheffield, Alabama (fol. 2153) and that the defendant believed that the operations of the

company which was to succeed the syndicate would be very profitable (fol. 2154); that at the time of the formation of the syndicate the defendant's interest in the United States Iron Company was known to a number of persons interested in the iron and steel industry and that the same had been the subject of publication in the "Iron Age" the standard iron and steel trade paper on September 18, 1902 (fol. 2162); that the plaintiff Sim had heard of the defendant's ore properties prior to the time of subscribing to the syndicate agreement (fol. 2175) and that he had heard of the proposed syndicate from Mr. Cluff before he had any conversation with defendant concerning it (fol. 2177) and that the defendant mentioned to the plaintiff Sim the name of the company the stock of which was to be acquired and where defendant's properties were to locate (fol. 2177); that the defendant told plaintiff's assignor Mr. Cluff, in 1901, that he had bought out Mr. Gates' interest in the United States Iron Company (fol. 2191); that sometime in the year 1902 Mr. Coles learned that defendant had purchased Mr. Gates' interest in the property of the United State Iron Company (fol. 2196); the referee also found that the Sheffield Coal & Iron Company had become insolvent and that its stock had become practically worthless (2271-2272) notwithstanding that he found that it owned valuable ore properties in and around Sheffield, Alabama (fol. 2153).

The referee, following the opinion of the Court of Appeals in the case of Hecksher *v.* Edenborn (203 N. Y. 210), held that defendant's failure to disclose his interest in the United States Iron Company operated in law as a fraud on plaintiff and his assignors (fol. 355) and directed judgment in

favor of plaintiff for the amount sued for with interest (fol. 358). Judgment was entered denying defendant's motion for a new trial and in plaintiff's favor for the sum of $94,962.90 (fols. 400-402).

It is clear from an examination of the findings of fact and from the opinion of the referee that he did not believe and did not find that the defendant was guilty of any actual fraud, but based his conclusion that plaintiff was entitled to recover entirely on constructive fraud on defendant's part in failing to disclose his interest in the United States Iron Company at the time the subscription agreement was signed. (See opinion of the referee Trans. fols. 374-376, 380, 381, 387).

On a writ of error the Circuit Court of Appeals that court held that the facts found by the referee did not support the judgment entered (Transcript, page 862); that defendant performed his duties as manager for and on behalf of the whole syndicate and not for and on behalf of any one subscriber; that he received the subscription of each subscriber on behalf of all and made the contemplated purchase and outlays on behalf of all and that when the defendant sold his stock in the United States Iron Company to the reorganized Sheffield Coal and Iron Company he sold it to that company as successor to the rights of all the subscribers to the syndicate; that if there was constructive fraud on Edenborn's part in not informing his subscribers of his personal interest in the stock of the United States Iron Company, the fraud was on the whole syndicate when the purchase was proposed and on the reorganized Sheffield Coal and Iron Company when the purchase was made; and that plaintiff could not restore the defendant to his original position by tendering him the stock

plaintiff had received in the reorganized company which stock represented a proportionate interest in other properties greatly exceeding in value the amount of the defendant's interest in the original capital of the United States Iron Company (Transcript page 862); that if the syndicate subscribers had any right of rescission that right must be worked out through the purchasing company; that because of the peculiar situation of this case, no right of rescission existed in favor of the plaintiff (fol. 863); the plaintiff thereupon applied to this court for a writ of certiorari, which was granted.

We shall discuss the following questions involved on this certiorari:

(1) No principle of law was violated by respondent in procuring the execution of the syndicate agreement.

(2) No cause of action exists in petitioner's favor for money had and received, because the syndicate received petitioner's money, and not respondent.

(3) The only agreement that can be rescinded is the agreement between the syndicate managers and Edenborn.

(4) Petitioner has not offered to place respondent *in statu quo* without which there can be no rescission. The findings of fact set out the syndicate agreement in full and show that it was carried out, but do not show that respondent can be placed *in statu quo*. In fact the findings show that respondent cannot be placed *in statu quo* and for this reason there is error of law in the judgment entered upon the facts found by the referee.

(5) The complaint is demurrable in that it fails to set out the syndicate agreement and fails to show that the circumstances were such that a re-

scission could be had and fails to show that respondent was placed *in statu quo* or that petitioner offered to place him *in statu quo,* and that he could be placed *in statu quo.* The complaint was demurrable because there was a defect of parties in that Walker and Mann, the other syndicate managers, were not made parties and in that the Sheffield Coal and Iron Company which succeeded to the rights of the syndicate managers was not made a party.

The suing out the writ of error and assigning error on the action of the court in overruling respondent's demurrer to the complaint bring up for review the sufficiency of the complaint. In addition to this, the question as to whether the complaint states a cause of action is a question of law arising upon the face of the record and is one that is open for the consideration of this court without an exception and without an assignment of error.

The question as to whether or not the findings of fact made by the referee support the judgment entered is a question of law that arises on the face of the record and if the findings of fact do not support the judgment, this is an error of such controlling character this court will notice it even without an assignment of error.

Chicago, Rock Island and Pacific R. R. Co. *v.* Barrett, 190 Fed. Rep. 118;
Seeberger *v.* Schlesinger, 152 U. S. 581;
Guaranty Trust Co. *v.* Koehler, 195 Fed. Rep. 669;
Paine *v.* Central Vermont R. R., 118 U. S. 152;
Roberts *v.* Benjamin, 124 U. S. 64;
Lupton *v.* Auto. Club, 225 U. S. 489, 495;
Chicago, Milwaukee & St. Paul R. R. *v.* Clark, 178 U. S. 353.

BRIEF OF ARGUMENT.

POINT I.

No principle of law was violated by respondent in procuring the execution of the syndicate agreement by petitioner and his assignors.

The referee has found the execution of the syndicate agreement (fol. 347); that at the time of the execution of the agreement by plaintiff and his assignors they had no knowledge of defendant's ownership of shares of stock in the United States Iron Company (fol. 350); that it was defendant's duty at and prior to the signing of said agreement by the subscribers to make a full and complete disclosure of his interest in the United States Iron Company (fols. 350-351). This finding of fact is also stated as a conclusion of law (fol. 354). We think there can be no doubt that this duty to disclose is really and properly a conclusion of law and not a finding of fact. There is no finding that defendant knew that the plaintiff and his assignors were ignorant of defendant's ownership of the shares of stock in the United States Iron Company; on the contrary, the referee found that defendant's interest in the United States Iron Company at the time of the formation of the syndicate agreement was known to a number of persons interested in the iron and steel industry and had been the subject of publication in the "Iron Age," the standard iron and steel paper, on September 18th, 1902 (fol. 2162). This publication appeared before plaintiff and his assignors had paid the whole amount of their subscriptions under the syndicate agreement (fol. 356). The referee found that the

minutes of the meeting of the stockholders of the United States Iron Company held on June 10th, 1902 (which was before any money was paid by plaintiff and his assignors on said subscription) showed defendant's ownership of stock of the United States Iron Company (fols. 2168-69). These minutes were read at the meeting of the stockholders of the Sheffield Coal and Iron Company held on June 9, 1903, and were approved at said meeting. At this meeting the plaintiff Sim and his assignor Cluff were present in person and the assignors Coles and Stone were present by proxy (fol. 2168). The referee also found that plaintiff Sim had heard of defendant's ore properties prior to and at the time of his subscription to the Syndicate agreement (fol. 2175); that the defendant told plaintiff's assignor Cluff in 1901 that defendant had bought out Gates' interest in the United States Iron Company (fol. 2191); that some time in the year 1902 plaintiff's assignor Cole learned that defendant had purchased Mr. Gates' interest in the property of the United States Iron Company (fol. 2197).

Defendant excepted to the 5th finding of fact to the effect that it was defendant's duty to make a complete disclosure to the syndicate subscribers prior to procuring their signatures to the agreement (fol. 2312) and excepted to the first conclusion of law which was to the same effect (fol. 2313); also excepted to the 1st, 2nd, 3rd and 4th conclusions of law (fol. 2313).

Defendant assigned as error the action of the referee in making said sixth finding of fact (fols. 2478-79) and also assigned as error the first conclusion of law made by the referee (fol. 2483); the defendant also excepted to the third conclusion of law to the effect that plaintiff was entitled to recover moneys paid by plaintiff and his assignors

to the syndicate managers on said subscription agreement (fol. 2314) and assigned error thereon (fol. 2485); also assigned error to the action of the referee in directing judgment for plaintiff (fols. 2364-2365).

In the case of Hecksher *v.* Edenborn, 203 N. Y. 210, 219, Judge Hiscock, speaking for the Court of Appeals of this State, in discussing the same agreement as involved in this action, said "there is nothing to indicate that defendant acquired his stock in the United States Iron Company for any such purpose (that is, acquired it at a certain price for the purpose of sale to the corporation and afterwards sold it to the corporation for a much higher price) or that the stock purchased by him and his associate managers in that company was not fairly worth the price paid for it, which was $30 per share less than the price fixed in the syndicate agreement. But broadly speaking, the complainants must rest their claim to relief on the basic principle that defendant induced them ignorantly to execute an agreement which violated the rule that an agent to buy may not purchase of himself."

At page 220, he said: "It (an action to recover based on a rescission) must stand as one directed against the syndicate agreement itself. If that was valid, plaintiff cannot succeed because under it and subsequently defendant did some illegal act in violation of it."

In the same case when before the Appellate Division, Second Judicial Department of the State of New York (131 A. D. 253), Justice Miller in discussing the same syndicate agreement said, "It may be conceded that the defendant was guilty of constructive fraud in purchasing for the syndicate the stock of the United States Iron Company, but the defendant's principal was the syndi-

cate which was succeeded by the corporation, and the right of the syndicate or its successor, the corporation to rescind the purchase of said stock does not give the syndicate subscribers the right to rescind their subscription contract. The contract of purchose of said stock, not the subscription contract, was rendered voidable by the defendant's constructive fraud."

At page 267, he said: "Here we have a case in which no fraud inducing the subscriptions is shown; but only a constructive fraud subsequent to the syndicate agreement upon the syndicate members generally to whose rights a corporation has succeeded. Obviously, in such a case the stockholders cannot in an action at law for damages compel the defendant to purchase their stock. Their action, if they have one, is a representative action."

The Circuit Court of Appeals concurred with the views expressed by Mr. Justice Miller (Transcript page 863).

We cannot persuade ourselves to the conclusion arrived at by the refereee in this case based on the opinion of the Court of Appeals in the Hecksher case. We think the opinion expressed by Mr. Justice Miller (now a judge of the Court of Appeals of this state) in the Hecksher case and concurred in by the Circuit Court of Appeals in this case, expresses the correct view of the law applicable to the facts presented here.

It is well established that the rule of law announced in the Hecksher case is not binding on this court because a question of general jurisprudence is involved in which this court will exercise its own independent judgment (City of Chicago *v.* Robbins, 2 Black, 418; Burgess *v.* Seligman, 107 U. S. 20; Gardner *v.* Michigan Central R. R. Co., 150 U. S. 349, 358).

If A appoints B as A's agent to purchase ten shares of stock of the United States Steel Corporation, 10 shares of stock of the New York Central Railroad Company and 10 shares of stock of the Western Union Telegraph Company, the mere fact that B at the time the contract was made is the owner of ten shares of stock of the United States Steel Corporation does not make the contract by which B was appointed agent either void or voidable. The law was not violated until the stock owned by B was purchased by him as agent for A. Upon subsequently learning the fact A could perhaps keep the stock and sue for damages or even if he had suffered no damage might rescind the transaction, return the stock and recover the amount paid. The transaction upon which the law frowns is the sale by the agent to buy, of his own property, to his principal. So here the syndicate was formed to purchase the stock of the United States Iron Company in which Edenborn owned an interest and also valuable coal and other property in which Edenborn had no interest (fol. 302). The syndicate agreement further provided that the parties hereto hereby form a syndicate to purchase, acquire, use, develop and dispose of the lands and properties above mentioned or so much or such part thereof as in the judgment and opinion of the syndicate managers is deemed advisable and proper" (fol. 306); it further provided "should the syndicate managers in the exercise of their absolute power and discretion hereunder, sell, convey, or transfer any of the money or property acquired by the syndicate, for either cash, bonds, stock or securities, each of the subscribers hereto shall be entitled to receive on the termination of this agreement and the dissolution of this syndicate his *pro rata* share thereof." It further provided "each and all the rights, liabilities, acts, un-

dertakings, powers and authorities of the syndicate manager under this agreement and in pursuance thereof shall control and become operative and in force by the act of assent of any two thereof and each and all matters and things to be done or performed in and under this agreement, and in and by said syndicate, and in and by all depositaries, agents, trustees and all other persons, firms and corporations connected therewith, shall be done and performed and carried out on the request, judgment and direction of the said syndicate managers when done by the act or assent of any two thereof (fol. 320);

When all subscriptions to the syndicate agreement had been procured, that contract became operative and the subscribers became bound each to the other for the amount of their respective subscriptions. If one of the syndicate managers was subsequently guilty of fraud in purchasing for the syndicate property in which he had an interest, that might, under certain circumstances, entitle the syndicate to rescind the purchase, but would not entitle any syndicate subscriber to rescind the syndicate agreement which had previously been made and had become binding upon him. The syndicate agreement could not be rescinded. Edenborn was not the agent of Sim and his assignors at the time they signed the syndicate agreement and became bound by its provisions. The agreement stated its purposes in language clear and explicit and the subscribers thereto were left free to determine whether or not they would execute it. When a subscriber signed the agreement he assumed certain contract obligations not only to the syndicate managers but to the other subscribers. His signature might influence others to subscribe. The subscriber, at the time he subscribed, was representing himself on

one hand and dealing with the syndicate managers on the other. The subscribers could have readily obtained all the information they desired about the ownership of the property if they only asked for it. It was just as much their duty to inquire as it was the duty of Edenborn to disclose without being asked. On the other hand, a fair inference from the findings heretofore set out is that Edenborn believed that the plaintiff and his assignors knew that he was interested in the stock of the United States Iron Company and it is clear that this is the reason he did not speak affirmatively on this subject.

It appears from the syndicate agreement itself that it was discretionary with the syndicate managers whether they would buy Edenborn's interests in the United States Iron Company. The agreement provided that the syndicate managers should purchase the properties therein described or so much or such part thereof as in the judgment and opinion of said syndicate managers was deemed advisable and proper (fol. 306). Under the decision of the Court of Appeals in the Hecksher case, the question of the validity of this agreement must be determined as of the *date* of its *execution* and by what was known and done by the parties prior to and at that time and not by what was subsequently done by Edenborn and the syndicate managers. Suppose Edenborn had not purchased the stock of the United States Iron Company, but had purchased stock or property in which he had no interest, as the syndicate managers were authorized to do by the terms of the agreement, and that this purchase of such other property was afterward fully carried out and a heavy loss sustained, could the plaintiff have rescinded the original syndicate agreement after such purchase simply because the syndicate

managers had been empowered by the agreement to purchase Edenborn's property? The Court of Appeals says the plaintiff could have rescinded the syndicate agreement under such circumstances; we say not. The fact that the syndicate of which Edenborn was a member was composed of two other members not controlled by Edenborn (fols. 2166, 2246) and that the decision of any two of such members controlled with respect to the subject matter of the syndicate, coupled with the fact that the syndicate agreement authorized the syndicate managers in their discretion to purchase certain property from one of such syndicate managers, is not alone sufficient to justify the setting aside of the syndicate agreement on the ground of constructive fraud based on the fact that the syndicate manager who owned such property failed to disclose his ownership therein at the time of the signing of the syndicate agreement. Suppose Mr. Walker, one of the syndicate managers, had solicited Mr. Sim to subscribe to the syndicate agreement just as was done by Mr. Edenborn, and then suppose that the syndicate managers had in the exercise of their discretion under the agreement, decided not to purchase Mr. Edenborn's stock in the United States Iron Company, but had purchased other property not owned by Edenborn, could Sim rescind, after discovering that Edenborn owned a large part of the stock of the United States Iron Company, simply because the syndicate agreement conferred such discretionary power on the managers and because Mr. Walker had not informed him of Edenborn's ownership in the stock of the United States Iron Company at the time of soliciting his subscription? It clearly appears that there is no constructive fraud in the procuring of the execution of this

agreement, for the reason that it can be carried out without purchasing Edenborn's property. It can be executed without operating as a legal fraud on the subscribers. The presumption must be indulged that at the time of the execution of this agreement the syndicate managers intended to discharge their duty to the subscribers and would do everything required of them by law in carrying out the terms of said agreement. It cannot be assumed that at the time of procuring the execution of the syndicate agreement, the syndicate managers intended to violate the law. It must be assumed that they would not, as syndicate managers, exercise their discretionary power to purchase Edenborn's property without communicating such ownership to the subscribers and having them sanction such action. It must be assumed that in the event they decided to purchase and did purchase such property they would inform the subscribers of their intention to purchase property in which Edenborn had an interest, or after such purchase would refer their action to the subscribers for ratification after fully informing them of the facts.

Suppose the managers under this agreement, which authorized them in their discretion to purchase Edenborn's property, had decided to purchase said property and had prior to such purchase referred their action to the subscribers for approval and then Mr. Sim, for the first time learned that Edenborn owned an interest in such property, could Sim rescind the agreement because it authorized the managers in their discretion to purchase such property after the subscribers had decided not to approve the plan of the syndicate managers and after the syndicate managers thereafter changed their plans and decided not to pur-

chase said property? The holding that the syndicate agreement can be rescinded under such circumstances involves the assumption that the syndicate managers in carrying out the terms of the syndicate agreement would violate their duty to the subscribers when the law presumes the contrary, if the contrary can be done under the terms of the agreement. The syndicate agreement can be carried out without violating the law, without any breach of trust by the syndicate managers even in the purchase of Edenborn's property. Therefore, this syndicate agreement cannot be rescinded on the ground that Edenborn was guilty of constructive fraud in procuring its execution by Sim. It is only a breach of duty under the agreement that can be set aside, not the agreement itself; hence the rule laid down by the Court of Appeals of the State of New York in Hecksher *v.* Edenborn is manifestly wrong.

The right, in the discretion of the syndicate managers to purchase Edenborn's property, does not constitute a violation of the rule of law that an agent to buy cannot buy of himself. If the syndicate managers had purchased Edenborn's property without knowledge of the facts then the syndicate managers could have rescinded the transaction or the corporation subsequently formed could have rescinded and any subscriber after calling upon the syndicate managers or the corporation to bring the action and their refusal so to do, could maintain a representative action for this purpose. If the sale was rescinded, Mr. Edenborn would be required to return to the corporation what he had received and would receive back that with which he had parted and as the corporation would be a party to or represented in the action, there would be no insurmountable difficulty in making the necessary adjustment to

place Mr. Edenborn in the position in which he was before the sale occurred. This would obviate the situation which the Court of Appeals concedes to be inequitable in this case and which it states might lead to almost absurd results where the property improperly purchased was smaller in proportion to the entire property acquired than here. This difficulty, however, the Court of Appeals dashes aside with the statement that it does not see how this result can be avoided.

POINT II.

The findings do not support the judgment because they show that the moneys were paid by plaintiff and his assignors to the syndicate managers as such and not to the defendant.

The Referee found at the request of the defendant as follows:

"That all the managers of said syndicate acted in carrying out the syndicate agreement and that the subscriptions of the plaintiff and his assignors were paid to and received by all of said managers as such" (fols. 2166-2167, 352, 353). This finding follows the terms of the agreement itself (fols. 307, 311, 313, 320). On the findings of fact the Referee based a conclusion of law that the plaintiff was entitled to recover the sums of money paid by the plaintiff and his assignors. The defendant excepted to this conclusion of law (fol. 2414) and assigned error thereon (fol. 2485).

We contend that plaintiff was not entitled to recover anything in this action because the finding

showed that the defendant never received any money from plaintiff or his assignors, except as the manager of the syndicate and this money evidently went into the possession of the Sheffield Coal & Iron Company either in the shape of money or property (fols. 359, 2166).

When a party has been induced by fraud to enter into a contract, he has two actions at law—one based on a rescission and the other for damages—but he cannot resort to both, for they are inconsistent; or he may sue in equity for a rescission, in which event an accounting takes the place of damages. This is an action for money had and interest based on a prior rescission of the syndicate agreement for fraud. The plaintiff below elected to stand on his cause of action based on a rescission (fols. 1530, 1531); that is, he claimed that he had rescinded the contract on account of fraud, and offered to return to the syndicate managers the stock of the Sheffield Coal and Iron Company, and demanded of them the return of the money which they had paid to the syndicate, and which this defendant never received in his separate and individual capacity or for his personal use and benefit. By this act, the person defrauded resumes in law the ownership of the consideration with which he parted, as the result of the fraud, and the law implies a promise on the part of the person to whom he paid it to return it, because such person holds it without having paid any consideration therefor. Such party may then, in a proper action, as for money had and received, recover back from the party guilty of the fraud whatever he may have paid him.

It is well settled that an action to recover back moneys paid upon a contract repudiated by one party thereto on the ground of fraud is based on the promise to pay implied by law and is therefore

an action for money had and received. (Freer *v.* Denton, 61 N. Y. 492, 495; Byxbie *v.* White, 24 N. Y. 607; Heckscher *v.* Edenborn, 131 A. D. 253; Gould *v.* Cayuga Bank, 86 N. Y. 75; Lambert *v.* Elmendorf, 101 A. D. 758; Wilson *v.* U. S. Cattle Ranch Co., 73 Fed. 994; Bridge *v.* Penniman, 9 Jones & Spencer, 183.)

After a rescission, the party rescinding has waived the tort except as a basis for proving a rescission, and cannot bring an action for damages based on the tort. The purpose of the action after a rescission is not to recover damages but to make the party disgorge what he has fraudulently obtained and the recovery must necessarily be limited by the party's enrichment from the alleged fraudulent transaction.

The undisputed evidence and the findings show that this money went through the syndicate (fol. 2166), of which Edenborn was a member, to the Sheffield Coal and Iron Company, and that this company had the whole beneficial interest in this money and property. The fact that plaintiffs, because of Edenborn's fraud as an individual paid money to the syndicate of which Edenborn was a member, but for the use and benefit of a third person or corporation to which it was paid in good faith before rescission, does not entitle plaintiffs, the defrauded parties, to recover from Edenborn the money they have parted with in an action at law based on a rescission.

Before an action can be sustained for money had and received, it must appear that the person who is sued received the money for his own benefit (N. Y. Guardian Co. *v.* Gleason, 78 N. Y. 503; Phoenix Bridge Co. *v.* N. J. Iron Co., 30 A. D., 614; Cyc., Vol. 27, p. 860.) Not a dollar of plaintiff's money was ever received by Edenborn, except as a syndicate manager. Not a dollar of the

money of any of the subscribers to the syndicate was ever received by Edenborn. It all went to pay for property in which Edenborn had no interest, and which was transferred to the Sheffield Coal and Iron Company. Strictly speaking, none of it was used to acquire Edenborn's stock holdings in the United States Iron Company. For his interest in the stock of the United States Iron Company amounting to $536,500, he received $375,550 in the stock of the new company. Every dollar of the plaintiff's money, along with that of the other subscribers, was used in the purchase of other property in which Edenborn had no interest. Of course, if this were an action to recover damages sustained by the plaintiff on account of defendant's fraud, it might be sustained as it would not be necessary to show that the plaintiff received any benefit from the transaction, but in every action based on a rescission for fraud of one of the parties, it is necessary to show that the party sued received the money. There is no pretence in this case that the defendant received this money except as the representative of the blast furnace syndicate to whom it was immediately delivered, and for this reason we insist that the judgment cannot stand. The referee does not find that Edenborn personally received this money, but only that the syndicate received it (fol. 2166).

POINT III.

The only agreement which could be rescinded is the agreement between the syndicate managers and Edenborn for the purchase of his stock in the United States Iron Company.

If there was any profit made by Edenborn out of the contract for the sale of his interest in said stock of the United States Iron Company to the syndicate, and if this contract was not ratified by the corporation or by the subscribers to the syndicate, the contract might have been rescinded. This transaction, however, could be rescinded only by all parties to it and upon restoring to Edenborn everything he had parted with, and such other parties would then be entitled to recover only what they actually paid to Edenborn. Probably no one member of the syndicate would be entitled even in that case to avail himself of the right to rescind, for that purchase was made on behalf of the syndicate as a whole, and while some of its members might wish to rescind, the other members might not be entitled to do so, or might not desire to do so. The syndicate agreement is one between all of the subscribers to the syndicate to do those things which the syndicate agreement provides for doing. In addition to that, it is an agreement between all of the subscribers and three managers of the syndicate who have been chosen to act for and on behalf of the entire syndicate, vested with certain powers and having enjoined on them certain duties and sustaining certain definite legal relations to the subscribers. We insist that the attempt made at rescission in this case has not

reached and cannot reach the only transaction which in our opinion is legally capable of rescission. The syndicate managers to whom is entrusted certain powers and duties purchased Edenborn's interest in the stock of the United States Iron Company (fol. 2259) though it is stated in the referee's first finding of fact that Edenborn owned this stock until he transferred it to the Sheffield Coal & Iron Company in December, 1902 (fols. 346, 2160); the syndicate managers also purchased the Mann property (fol. 2274); they also purchased coal property in Virginia and purchased blast furnace property (fols. 302, 304, 351, 2167). After the subscription by plaintiff, the name of the United States Iron Company was changed to that of the Sheffield Coal & Iron Company and the capital stock increased from $1,000,000 to $2,500,000—and plaintiffs received the exact amount of their subscriptions to the syndicate agreement in stock of the Sheffield Coal and Iron Company at par (2268). This stock was evidently a part of the 25,000 shares of stock that the syndicate managers directed the Sheffield Coal & Iron Company to distribute among the subscribers to the syndicate agreement in amounts equal to the amounts of their respective subscriptions (fol. 2270); the syndicate, acting through its managers, acquired the Edenborn stock in the United States Iron Company. It did not acquire this stock any more nor any less than it acquired the coal property or the blast furnace property. The only transaction which is capable of rescission, if the facts warrant it, is the contract by which Edenborn's individual stock in the United States Iron Company passed to the syndicate or to the Sheffield Coal and Iron Company through the agency of the syndicate managers. Defendant's subscription to the syndicate agreement was for $500,000 and was subse-

quently reduced to $475,000 (fol.) and at that time he owned 5365 shares out of the total outstanding capital stock of the United States Iron Company of 9,250 shares, and in part payment of his subscription he transferred the said 5,365 shares of stock in the United States Iron Company to the syndicate at $70 per share (fol. 2259); in other words, it is conceded that the stock of the United States Iron Company was purchased for the sum of $647,000 and Edenborn's interest in said stock was purchased for $375,550 (fol. 2259). The total capitalization of the new company was $2,500,000. The purchase of the stock of the United States Iron Company owned by Williams of 518 shares (fol. 2263) and by Elwood of 2201 shares (fol. 2257) is not condemned because of any trust relationship which they sustained towards the syndicate subscribers. It is not claimed that the purchase of the remainder of the property by the syndicate should be set aside because of anything done by Edenborn. The remainder of the money subscribed—about $2,000,000.—went into equipment, blast furnaces, coal lands and other property. The Court of Appeals said, in the case of Heckscher *v.* Edenborn, 203 N. Y. 210:

"Of the $2,500,000 subscribed, $647,500 in effect was expended for purchasing the entire capital stock of the United States Iron Company at $70 per share" (p. 215).

Edenborn's stock was included in this purchase. Continuing, the Court said:

"The balance of the aggregate subscriptions, with the exception of something over $900,000, which was reserved for future use, was expended in purchasing other properties. As has already been indicated, respondent purported to pay his subscription of $500,000 to a large extent by turn-

ing in his holdings of the capital stock of the Iron Company at $70 per share" (p. 215).

So we have $2,124,450 of the total $2,500,000 of capital stock subscribed concededly going into property under the direction of syndicate managers or their successor the corporation, about the purchase of which there can be no objection. An action in equity against William Edenborn alone for a rescission of the syndicate agreement could not be successfully maintained and we do not think that an action at law by a subscriber based on a rescission could be successfully maintained against Mr. Edenborn alone. The Court of Appeals further said (page 230):

"The agreement authorizing the purchase and organization of various properties was an entire one. The conclusion has been reached that so far as it authorizes the purchase of or related to defendant's property, it was constructively fraudulent, even though there was no actual fraudulent motive on his part."

To say that the syndicate agreement, when signed by a subscriber, was in any sense fraudulent because it authorized the purchase of Edenborn's property, in our opinion, misconceives or misunderstands the point. It was perfectly legitimate for the syndicate agreement to provide for the purchase of Edenborn's property as heretofore discussed. It was perfectly legitimate for him to procure signers to that agreement. This agreement at no time ever became subject to rescission for fraud. The fact is that the fraud occurred, if at all, not when the syndicate agreement was signed, but when the syndicate purchased Edenborn's stock. It was this additional step that made the transaction constructively

fraudulent. Therefore we cannot assent to the statement in the opinion of the Court of Appeals—that the syndicate agreement was constructively fraudulent. Judge Hiscock further says: "I see no way by which the instrument can be subdivided." See what a far-reaching result this would be: $2,124,450 worth of other property, purchased by the syndicate, to which no objection can be made by any one, is claimed to be affected by Edenborn's act. Yet if this decision is followed, Edenborn is not only compelled to rescind the arrangement by which he and his associates got his property and turned it over to the syndicate but he is compelled to return to the stockholders $2,124,450.00 worth of stock which had concededly no fraudulent connection with his failure to disclose his interest in the stock of the United States Iron Company. If this is correct, Edenborn is bound to take the stock of every individual in this corporation who comes before the Court and swears that he did not know that Edenborn was the owner of this stock. Plaintiff claims that defendant was his agent and that he could therefore rescind not the transaction by which the agent's property was purchased, but the very transaction in which he was appointed his agent. On the other hand, we assert that he never was the agent of plaintiff, certainly not until after the syndicate contract was made, and that even then the syndicate as a whole was the principal and that the syndicate managers were the agents of the syndicate only and not of each individual subscriber. The Sheffield Coal and Iron Company succeeded to all the rights of the syndicate and it is through that company, if at all, that the purchase of Edenborn's property may be rescinded. Prior to the transfer of the property to The Sheffield Coal & Iron Company the rescission could

have been effected by the syndicate as a whole if the facts justified it. Similar situations have frequently arisen, but usually in cases where a fraudulent profit was made in the transaction, and the books are full of cases where some individual undertook to obtain subscriptions to an agreement to buy property and turn it into a corporation and where it subsequently developed that such person was interested in the property sold or had obtained some profit out of the transaction which he had failed to disclose. But no case can be found in which, as here, the subscriber has been allowed to rescind his subscription contract by tendering to the agent or promoter stock not received from him and recover back the amount of the subscription which was not paid to him. What then are the remedies which a subscriber to the stock of the corporation has under such circumstances?

1. If the subscriber has been induced by fraud to subscribe, he may have an action in the nature of deceit against the one who has made the false representation.

2. If the subscription to the stock was induced by a false representation made by the agent of the corporation, the subscriber may bring an action against the corporation for the purpose of rescinding the subscription, or could, perhaps, surrender his stock to the corporation and demand back the money paid for it.

3. If the agent has merely failed to disclose his interest in property sold to the syndicate or corporation, or has made a secret profit in connection with such sale, the action belongs to the corporation, which, under proper circumstances, may either rescind the sale, returning the property purchased and receiving back the money or stock

paid therefor, or it may compel him to account for the profit obtained by such sale. In case the corporation does not undertake to sue of its own motion, a stockholder may bring suit joining the corporation as a party defendant.

In each of these cases the amount of damages is carefully restricted to the profits made by the promoter, and if a rescission is permitted, only the sale of such property as has been actually transferred by the promoter to the corporation is abrogated, and the amount paid for such property is returned to the corporation. If the plaintiff desire that the sale of Edenborn's property to the syndicate should be rescinded, he should have brought his action, joining the corporation as defendant in case the company refused to take such action itself. It may be that he was unwilling to pursue that course because the property sold by Edenborn was of such value as to make it unwise to return it to him. If it were true that Edenborn had made any profit out of the transaction, that could be recovered in the same manner. If Edenborn had induced plaintiff to subscribe to the syndicate agreement by fraudulent representation the plaintiff could recover his damages in an action for deceit. Although, in view of the fact that by the syndicate agreement the subscribers expressly authorized the purchase of this specific property, it is doubtful if they would be entitled to recover in any form of action unless they could show actual fraud or secret profit obtained by defendant. (Hutchinson *vs.* Simpson, 92 A. D., 398; Blum *vs.* Whitney, 185 N. Y., 240).

POINT IV.

Plaintiff and his assignors did not offer to and did not place defendant in statu quo.

The referee found the existence of a syndicate agreement (fol. 347); that the consolidation proposed in said agreement was carried out (fols. 351, 2160); that the subscriptions of the plaintiff and his assignors were paid to and received by all of the syndicate managers as such (fol. 2166, 2167); that the plaintiff and his assignors elected to rescind, notified the syndicate managers, and offered to restore and return the stock which each had received and demanded the return of their money (fol. 352); that defendant's failure to disclose his ownership of the stock of the United States Iron Company operated in law as a fraud on plaintiff and his assignors (fol. 355); and that plaintiff was entitled to recover the sums paid him, with interest (fol. 356). The defendant excepted to these findings. (See exception No. 6, fol. 2312; exception No. 8, fol. 2313; exception No. 10, fol. 2314; and assigned error on this action of the court, fols. 2480, 2483, and 2485).

In the case of Grymes *v.* Sanders, 93 U. S. 55, the United States Supreme Court said:

> "A court of equity is always reluctant to "rescind unless the parties can be placed in "*statu quo*. If this cannot be done it will give "such relief only where the clear and strongest equity imperatively demands it."

The general doctrine of rescission has been clearly stated by the Court of Appeals in the case of Cobb *vs.* Hatfield, 46 N. Y. 537, where Judge Allen said:

"The law not only requires a disaffirmance "of the contract at the earliest practical "moment after discovery of the cheat but a "return of all that has been received under "it and the restoration of the other party to "the condition in which he stood before the "contract was made."

In the case of Francis *vs.* N. Y. & B. L. R. R. Co., 108 N. Y., 97, Judge Finch said:

"The theory of rescission is that the party "proceeded against shall be restored to his "original position."

And he further held under the facts of that case that the alleged rescission was ineffective because it was "very far from restoring the company to its original position."

In the case of Curtis *vs.* Howell, 39 N. Y. 215, the Court of Appeals said:

"When the power to restore ceases, the "right to rescind ceases."

The case of Getty *vs.* Devlin, 54 N. Y., 403, is directly in point, although that was a case of gross actual fraud and was a suit in equity. In that case four persons, owning certain oil land which had cost them about $30,000, agreed to combine their interests, to organize a company and transfer their interests to the company at a large price above the cost and to divide the profits. To carry out his purpose they procured a subscription paper to be drawn up by which the subscribers agreed to pay the sums subscribed for the purchase of property, specifying therein the lands above mentioned, at the sum of $125,000. Each of the four persons interested in the property subscribed $5,000 and caused certain others to sign as decoy subscribers for about half the

amount subscribed. These subscriptions were not in fact paid, although so marked and it was never intended that they should be paid. The plaintiffs, induced by the fraudulent assurances of one of the originators of the scheme that the land originally cost $125,000, and upon the belief that they became subscribers on a footing of equality with the others, subscribed and paid in their subscriptions. The moneys so paid were received and divided by the four associates. The company was thereupon organized, the property transferred to it, and stock taken in payment and divided *pro rata* among the subscribers, as well those who had not as those who had paid.

The court expressly held that the plaintiffs could not, on account of the fraud, recover back money paid by them, because they could not restore the four defendants to the position they were in before the transfer of the real estate, and that by returning the shares of stock which they held in the company which had taken title to the real estate, they did not put the four defendants in the position which they originally occupied, because what the defendants parted with was the real estate, and that had passed beyond their control. But, this being an action in equity, the court held that the defendants might be compelled to account for the profits they had made upon the real estate and which they had fraudulently appropriated to the exclusion of their associates. The court, after considering the gross fraud of the defendants and stating that the plaintiffs were entitled to relief in some form said, with peculiar pertinence to this case:

> "They could not, on account of the fraud, recover back all the money paid by them, because they could not restore the four defendants to the position they were in before the

transfer of the real estate to the company. The real consideration for the money subscribed and paid was the real estate which was conveyed to the company at the request of the subscribers. The company took the title to the real estate, and then their interest in the company and through it in the real estate was represented by shares of stock. The plaintiffs did not place the four defendants in the position they were before the real estate was conveyed, by returning their stock, because what the defendants parted with was the real estate, and that had passed beyond their control. The plaintiffs caused it to be seized and sold for their debts against the company, after the discovery by them of the fraud of which they complain. It is a rule, quite uniform, that a party who seeks to recover back money which he has been induced to pay for property by fraud, must restore the property before he can rescind the contract of purchase and recover the money paid. And he must act promptly upon the discovery of the fraud (Cobb *v.* Hatfield, 46 N. Y. 533; Masson *v.* Bovet, 1 Denio, 69; Moyer *v.* Shoemaker, 5 Barb., 319). It matters not, so far as I can discern, that it is difficult or even impossible for him to do so, so long as he is not prevented by the act of the wrongdoer. Before he can adopt this form of remedy he must do it, and the action in such case may be at law. All the defrauded buyer has to do is to tender back what he has received, and then he can commence his action at law to recover the money paid. In this case, if the tender of the release of the stock was sufficient, no resort to equity was necessary or proper, as each one of the plaintiffs could at once, after the tender, have sued in an action at law to recover the amount of money paid by him. A joint action by all the plaintiffs would not have been proper. Hence, this action cannot be maintained for the recovery of the entire amounts paid by the plaintiffs,

upon the theory that they have restored to the four defendants all that they parted with for plaintiff's money."

Vail *vs.* Reynolds, 118 N. Y. 297.
Hammond *vs.* Pennock, 61 N. Y., 145.
Pullman *vs.* Alley, 53 N. Y., 637.
Gould *vs.* Cayuga Nat. Bk., 86 N. Y., 75.
Hogan *vs.* Weyer, 5 Hill, 389.
Bedell *vs.* Bedell, 3 Hun, 580.

The English cases on the question of rescission are uniform and in accord with the authorities cited in this State.

In *Re* Cape Breton Co., 19 Ch. D., 77, the court held:

"In 1871 certain coal areas were purchased for £5,500 by six persons, of whom F. was one, and were vested in G. as a trustee for them without disclosing the trust. In 1873 a company was formed for the purpose of purchasing these areas and other property. F. was one of the directors, and as such he concurred in effecting a purchase by the company fom G. for £12,000 cash and £30,000 in fully paid-up shares, without disclosing the fact that F. was a part owner. In 1875 the company was ordered wound up. In 1878 a meeting of the contributories was called, at which two rival schemes were brought forward, one for repudiating the purchase of the coal areas, the other for adopting the purchase and selling the property. The latter scheme was adopted and was confirmed by the court. The liquidator accordingly sold the property, but at a heavy loss. A contributory then took out a summons under sect. 165 of the Companies Act, of 1862, to make F. liable for misfeasance as a director in allowing the company's seal to be affixed to the agreement for purchase by the company. Mr. Justice Pearsons dismissed the summons,

holding that though the company would have been entitled to rescind the contract, yet as rescission had become impossible, no relief could be given against F.

Held, by Cotton and Fry, L. JJ., *dissentiente*, Bowen, L. J., that this decision was right.

* * * * * * * *

Cotton, L. J. "* * * It is material on that part of the case to consider what I have already mentioned—that the company was expressly formed for the purpose (among other things) of acquiring this particular property. The directors therefore were not acting under a general authority to buy property. If they had been, it might be said that when an agent does not buy, but hands over to his principal property of his own, he has not performed the commission entrusted to him. No authority has been quoted to show that even in that case a director would be liable to an action by any shareholder for not having performed the duty which was entrusted to him by the company, and in my opinion such an action could not be maintained. There could be no action at law, and it cannot be considered that a contributory can acquire a right to bring in substance such an action by taking out a summons under sect. 165. Subject to what we might hear in arguments, for we have not heard the respondents on this point, and assuming that the whole circumstances were not in fact known to the board and to the company at the time of the purchase, the company, if so minded, might have set aside this purchase altogether. Where a trustee purchasing on behalf of his *cestui que trust*, purchases his own estate without disclosing his own interest in it, the *cestui que trust* when he discovers the fact, may, if he pleases, set aside the contract altogether, but then he must return that which has been purchased. The same rule applies in the case of a purchase by a director on be-

half of a company, of property in which he has any interest: if the company repudiates the contract, the property must be returned. In this case a return of the property is impossible after what was done in 1878."

Bentinck *vs.* Fenn, 12 App. Cas., 658:

Lord Herschell,

"Now there can be no doubt that inasmuch as Mr. Fenn was interested with his partner Mr. Crosthwaite to the extent of three-tenths of the value of these three coal areas, holding three-tenths of the shares in the Coal Area Association Limited, he was bound to disclose that interest to the other directors of the new company who were entering into a contract for the purchase of them, and his failure to make that disclosure would entitle the company, upon discovering his interest, to rescind the sale. I think about that there can be no manner of doubt, but at the present time rescission has become impossible. * * *

"Again, there probably is little doubt that if an agent of a company is employed by that company to make a purchase for them in the market of goods of any description, and if instead of making that purchase in the market at the market price he sells to his company goods of the required description which he happens to own, at a price in excess of the market price, he can be made to pay to the company that excess, so as to leave their purchase, as it ought to have been, at the market price according to the obligations which he is under to them. But in the present case the purchase that was made was a purchase of specific property, it was that specific property alone which the agent, the director, was authorized to purchase; it was not left to him to purchase, at the best price at which they could be obtained, goods or land of a particular description, but his agency, so far as it existed at all, was an agency to purchase this

specific property in which it is proved he had an interest.

"Now, I am by no means prepared to say that the argument of the appellant is well founded that such a case as this is a parallel case to the class of cases to which I have alluded, where an agent employed to go into the market and buy at the market price sells his own goods to the company at something above the market price. But I do not think it necessary to come to any absolute determination upon that point, because it is of the very essence of such a case as this to show that the price at which the property was sold to the company was in excess of what has been called the real price or the true value. Now what evidence is there here, upon which your Lordships would be entitled to act, that the property in question when purchased by the company was sold to them at a price in excess of the real value, or the market value or the true value in which ever way you put it? I admit that there may be considerable ground for suspicion that the price was in excess of it. But obviously for such a case as the appellant seeks to make out here much more than that is necessary. It is of the very essence of the case, which rests upon his proving what he claims, namely a secret profit improperly made, that he should prove that there has been that excess which he alleges. * * *"

Ladywell Min. Co. *vs.* Brookes, 35 Ch. D. 400:

"On the first of February, 1873, five persons (one of whom was a solicitor and conducted the negotiations) purchased a leasehold mine for £5,000 with a view of reselling it to a company to be formed; but they had at that time taken no steps to form any company. They completed their purchase on the 17th of March, 1873, the purchase money being paid out of their own moneys, and on the

4th of April they entered into a provisional contract with a trustee for an intended company for the sale of the mine to the company for £18,000. On the 8th of April, the company was registered under the Companies Act, its principal object being, as stated in the memorandum of association, the purchase of the mine, and in its articles the contract of the 4th of April, 1873, was adopted and confirmed, and four of the vendors were named as directors; but the contract of the first of February, 1873, was not disclosed to the company. The whole of the shares were placed by the vendors, and the share capital (£30,000) paid by them. At the same time they received £18,000 from the company as the purchase-money for the mine. In 1882 the company was wound up voluntarily, and in the course of the winding-up the facts relating to the purchase of the mine by the vendors became known to the company. In 1883 the company allowed judgment by default to go against them in an action by the lessor to recover possession of the mine. In 1884 the company commenced two actions against the executors of three deceased vendors and the two surviving vendors to recover the secret profits made by the vendors on their sale to the company, on the ground that they stood in a fiduciary position to the company:

Held (affirming the decision of Stirling, J.), first, that the evidence did not prove that the vendors when they purchased the mines were promotors of, or in a fiduciary position towards the company which was ultimately formed; secondly, that assuming that the vendors committed a breach of duty in not informing the company after it was formed that the mine was their own property, and consequently that the company might have rescinded the contract, yet as rescission was now impossible, the company could not recover from them the profits which they had made. The action was accordingly dismissed."

In Re Lady Forest Gold Mine (1901), 1 Ch., 582:

"A syndicate, of which S. was a director and member, was formed in February, 1895, to acquire and work a mine, and in the same month issued a prospectus showing that the directors were aware that similar properties were often resold 'to the public' at a profit, and were 'not unmindful of the benefit that' might 'arise by converting the syndicate into a very much larger company within a short period.'

In October, 1895, the directors promoted and brought out a company, with a larger share capital than that of the syndicate, to purchase the mine on the terms of an agreement, already entered into in the same month with a trustee for the company, which provided for the payment of a purchase money much larger than what had been paid for and expended upon the mine by the syndicate. The same persons were the directors of both the syndicate and the company. In the same month the company issued a prospectus offering some of its shares for public subscription and stating the names of its directors that they were directors of the syndicate selling to the company, and the date of, parties to, and consideration for the sale to the company. Inspection of the contract was also offered. The amount of profit on the resale to the company was not stated, and subject as aforesaid, there was nothing in the prospectus to show that the sale was at a profit.

The court found as a fact that when the syndicate acquired the mine it had no present intention of reselling to or forming another company, but contemplated working it in the first instance.

In the winding-up of the company it was sought to make S. liable on a misfeasance summons for the secret profit received by him as a promoter of the company.

Held, (1) that the syndicate and its directors were not promoters of the company when the syndicate acquired the property.

(2) That the disclosure in the prospectus of the company of the fact that the directors of the syndicate were directors of the company was a disclosure that some profit was being made.

(3) That S. and the other directors were guilty of a breach of duty in not disclosing what profit had been made on the resale to the company.

(4) That although the company might have had a right to rescind the contract S. could not be ordered to repay the profit which he had derived from the resale to the company.

Gluckstein *v.* Barnes, (1900) A. C. 240, distinguished.

* * * * * * * *

"There is the decision of the other two members of the Court of Appeals in Re Cape Breton Co., (1) which has been sometimes explained as proceeding upon peculiar facts; there is the case of Ladywell Mining Co. *vs.* Brookes (2) which has not been so explained; and there is the statment of Lord Cairns in Erlanger *vs.* New Sombrero Phosphate Co.—(3) all of which appear to me to go to this result: that although there is a breach of duty in such a case sufficient to entitle the vendee company to rescind or repudiate the contract if matters have not been too much altered in the meantime, nevertheless there is sufficient ground for requiring a person in the position of Mr. Simpson to repay the profit or the benefit that he has received out of the sale. It is quite true, I think, that the cases on which so much reliance has been placed on Mr. Simpson's behalf have been to some extent doubted, perhaps even questioned, in later cases, and certainly some of them have been more or less criticised, but they have been cited and discussed and have not been expressly dissented from, still less overruled, in any case to which I have been referred."

The stock which the plaintiff and his assignors offered to deliver to the defendant never was the property of the defendant and he never had any interest of any kind therein. The defendant Edenborn never owned plaintiff's subscription to the syndicate agreement, yet plaintiff and his assignors have obtained a judgment which in effect compels Edenborn to purchase or take off plaintiff's hands the shares of stock which they purchased in the Sheffield Coal & Iron Company. Whatever the plaintiff and his assignors may do in this case may be done by all the subscribers to the syndicate agreement who can show that they did not know of Edenborn's interest in the stock of the United States Iron Company at the time they subscribed. If this judgment can be sustained then Edenborn can be compelled to accept and pay for the stock of all the other subscribers amounting to two million dollars. He can be made to accept the ownership of stock for which he never contracted and which he never at any time owned and in which he never at any time had any interest. Before the syndicate agreement he owned 5,365 shares of the stock of the United States Iron Company which was turned in to the Sheffield Coal & Iron Company for $375,550. After a rescission by all the subscribers, in the event they should decide to rescind, as has been done by plaintiff below in this case, Edenborn would own all of the stock of the Sheffield Coal & Iron Company. This same result would be reached although his interest in the United States Iron Company amounted to only one thousand dollars; that is if his interest in the stock of the United States Iron Company had amounted to only $1,000.00 the other subscribers could under the rule of law announced in the Hecksher case compel the defendant to take

over their subscriptions amounting to $2,449,000. The parties could not be placed in *statu quo* by rescinding the subscription contract between defendant and plaintiff because it is now converted into shares of the Sheffield Coal & Iron Company and that company is the only party liable in an action for rescission, if one can now be sustained.

When the subject matter of a contract has been so dealt with that the court cannot place the parties in their original state there can be no rescission but the parties must be left to an action for damages.

Furness *vs.* Grove, 12 How. 51.
Murray *vs.* Watson, 8 Cow. 238.
Curtis *vs.* Howell, 39 N. Y. 211.
Padden *vs.* Taylor, 44 N. Y. 371.

The court instead of restoring to defendant Edenborn the $375,550 worth of property which he put into the enterprise, and, as the law requires, putting him in *statu quo,* would compel defendant Edenborn to enter into a new contract by which he is to become the subscriber to two million dollars of stock, in addition to the $375,550 worth of property which he put into the enterprise and the additional stock for which he paid in cash. Instead of putting him in *statu quo,* the court would in this manner make him the sole owner, with one or two exceptions, of all the stock of the Sheffield Coal & Iron Company, and this notwithstanding the fact that all of the property which was purchased by the syndicate outside of the stock of Edenborn in the United States Iron Company was property in which Edenborn had no interest whatever.

The remedy of rescission is an equitable remedy resorted to for the purpose of doing equity, and

not for the purpose of perpetrating a wrong and hardship. The referee has found that the syndicate agreement was entered into in good faith on the part of defendant, (fol. 2154); that no statements were made by defendant with the intent to deceive, defraud or mislead plaintiff or his assignors (fols. 2158, 2172, 2179, 2184, 2188, 2193); that the defendant did not intentionally conceal his interest in the United States Iron Company from the plaintiff and his assignors (fols. 2163, 2164).

We submit that it was Edenborn's duty as well as that of the syndicate managers who represented plainiff and his assignors to carry out the syndicate agreement. It was entered into in good faith by Edenborn, without any intent to conceal his interest in the stock of the United States Iron Company; it is evident from the findings that Edenborn believed that plaintiff and his assignors knew all about his interest in the United States Iron Company; the provisions of the agreement were carried out in good faith by Edenborn and every member of the syndicate at a time when the agreement was in full force and effect. It is submitted that plaintiff's attempted rescission cannot operate so as to invalidate as between plaintiff and defendant, what was done under that agreement. The plaintiff was represented by the other syndicate managers, who had no interest in the United States Iron Company and who could control the action of the syndicate with respect to the propriety of the purchase of Edenborn's stock.

We contend that the rule announced by the Court of Appeals that defendant cannot set up the syndicate agreement to justify acts done under it and to prevent a rescission after plaintiff has taken advantage of the right to rescind, is mani-

festly erroneous. This might be the proper rule in some cases but should not apply to a case where there was no attempt to deceive or conceal; where the fraud, if any, resulted only by operation of law. We think rescission cannot be accomplished here because defendant cannot be placed in *statu quo*, because it would be inequitable to place a heavy punishment on him where he acted in perfect good faith, as appears from the findings of the referee in this case.

The findings of fact under the rules of law hereinbefore announced show that petitioner is not entitled to judgment because they show that respondent under the peculiar circumstances of this case, cannot be placed *in statu quo*.

POINT V.

The court erred in not sustaining the demurrer to the complaint.

Defendant demurred to the complaint on the following grounds, among others: (1) that it did not state facts sufficient to constitute a cause of action; (2) that there is a defect of parties defendant because of the omission of August Mann and J. C. Walker, the other two syndicate managers; (3) that there is a defect of parties defendant because of the omission of the Sheffield Coal & Iron Company (fol. 169). The demurrer was overruled (fol. 177) and interlocutory judgment to that effect entered (fol. 180). The defendant assigned error to the action of the court in overruling the demurrer (fols. 2360, 2361, 2362, 2363).

We think this demurrer should have been sustained for the reasons which have been fully presented in the preceding points of this brief and which we shall not here repeat.

If the propositions of law heretofore laid down are correct, the complaint was demurrable because there was a defect of parties in that Walter and Mann, the other syndicate managers, were not made parties thereto and because the Sheffield Coal & Iron Company was not made a party thereto. The complaint was also demurrable because it failed to show that the agreement was capable of rescission; it failed to state that petitioner had in fact offered to place respondent *in statu quo;* and it failed to show that respondent could be placed *in statu quo.*

POINT VI.

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

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BRIEF FOR RESPONDENT.

Office Supreme Court, U. S.
FILED
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JAMES D. MAHER
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1916.

No. 3.

JAMES SIM,

Petitioner,

versus

WILLIAM EDENBORN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Supreme Court of the United States,

OCTOBER TERM, 1916.

No. 8.

JAMES SIM,

Petitioner,

against

WILLIAM EDENBORN,

Respondent.

Statement of the Case.

This case comes here on a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit (Trans. p. 865) to review the judgment of the Circuit Court of Appeals entered on July 7, 1913 (Tr. p. 863), reversing the judgment of the United States District Court for the Eastern District of New York in favor of petitioner for the sum of $94,962.90 entered upon the report of a referee appointed under a stipulation waiving a trial by jury (Tr., fols. 338-342).

The action is at law to recover certain sums of money claimed to have been obtained from petitioner and his assignors by respondent's fraud in procuring their signatures to a syndicate agreement. It was commenced in the Supreme

Court of Kings County, State of New York, and afterwards removed to the United States Circuit Court for the Eastern District of New York on the ground of diverse citizenship.

The complaint alleges that from the 15th day of April, 1902, until the 1st day of January, 1903, defendant (respondent) was engaged in promoting, forming and carrying out a syndicate agreement to purchase, develop and dispose of certain lands and properties and for the purchase of the United States Iron Company of New Jersey, capitalized at $1,000,000, and its properties, and for this purpose prepared a syndicate agreement, appointing defendant and J. C. Walker and August Mann syndicate managers; (this agreement appears at folio 301 of the Transcript); that the defendant submitted same to the subscribers thereto and procured their subscriptions to the same; that under the syndicate agreement the defendant occupied a relation of trust and confidence to the subscribers and it was his duty to make to them a full disclosure of all the facts and circumstances within his knowledge necessary to enable the subscribers to form an independent judgment and to protect their interests; that plaintiff, one of the subscribers, had unlimited confidence in and relied on and trusted defendant to the fullest extent (fol. 14). It was further alleged in the complaint that, as an inducement to plaintiff to subscribe, defendant by the terms of the said syndicate agreement represented and stated to the subscribers that an opportunity was afforded to acquire for a cash consideration the ownership, control and possession of the United States Iron Company of New Jersey, capitalized at $1,000,000, and that at the time the defendant induced plaintiff to subscribe to said syndicate agreement defendant

owned 5365 out of a total of 9250 shares of the capital stock of said United States Iron Company then outstanding, and, intending to deceive and defraud plaintiff and other subscribers, concealed from them the fact that he owned a majority of the capital stock of the said company and controlled it (fols. 17-18); that the plaintiff paid to the syndicate managers the amount due on his subscription in installments between July 20, 1902, and December 20, 1902, and received certificates of stock of the par value of $100 each in the Sheffield Coal & Iron Company (fols. 22-23). It is further alleged in the complaint that after procuring the execution of the syndicate agreement by the subscribers, defendant caused the name of the United States Iron Company to be changed to that of the Sheffield Coal & Iron Company and the stock to be increased, and called upon the plaintiff for the payment of his subscription which plaintiff paid as aforesaid, and on or about January 1st, 1903, defendant delivered to plaintiff said certificates of stock in the Sheffield Coal & Iron Company (fols. 26-27); that the plaintiff, after the discovery of the fraud, deceit and fraudulent concealment practiced on him by defendant, notified the syndicate managers, including the defendant, that he elected to rescind his subscription to said agreement and offered to return the said certificates of stock to the defendant and demanded of defendant payment of the money which had been paid to defendant on the subscription agreement, which demand was refused; that plaintiff was ready and willing to deliver said certificates and receive back the money paid the defendant (fols. 27-28).

The second and third causes of action set out in the complaint are based on allegations of sub-

stantially the same fraudulent acts on the part of the defendant in inducing the subscribers Cluff and Coles to sign the same syndicate agreement. The fourth cause of action is based on substantially the same claims of fraudulent representations and concealment practiced by defendant on Elmer E. Stone, which caused said Stone to authorize a subscription of $5,000 to the syndicate agreement (fol. 350).

A demurrer to the complaint (fol. 75) was sustained on the ground that the complaint constituted an equitable action involving the rescission of the agreement with the other subscribers to the syndicate while apparently setting forth a demand for a tort, and on the further ground that the complaint did not state facts sufficient to constitute a cause of action and that there was a defect of parties because the other syndicate managers and the Sheffield Coal & Iron Company were not made parties (fol. 94). Thereupon plaintiff amended his complaint, but the only substantial change made is the addition of a paragraph stating that the stock of the Sheffield Coal & Iron Company was worthless (fol. 162) and an allegation that the sums paid in by plaintiff on the syndicate agreement were paid to *defendant* (fols. 113, 114). The defendant demurred to the amended complaint and the same Judge who passed on the first demurrer held that the complaint stated a cause of action at law based on a rescission of the contract and overruled the demurrer. A decision was entered which recited: (1) that the complaint stated facts sufficient to constitute a cause of action; (2) that there was no defect of parties defendant and (3) that the complaint stated a cause of action at common law, based on a rescission of a contract alleged to have been procured by fraud

(fol. 177). Interlocutory judgment was entered overruling the demurrer (fol. 69).

The defendant in his answer (fol. 85) denied the material allegations of the complaint, except that he admitted the execution of the syndicate agreement which was annexed to the answer as an exhibit (fol. 301).

The parties by stipulation referred the issues of law and of fact to Edward W. Hatch, referee, to hear and determine, and an order was accordingly entered (fols. 338-342). After a trial the referee made a report finding that defendant solicited plaintiff and his assignors to become subscribers to the syndicate agreement which authorized and contemplated the purchase of the stock of the United States Iron Company and other properties by the managers of the syndicate (fol. 347); that defendant did not disclose to them at or prior to the signing of said syndicate agreement his ownership of shares of stock in the United States Iron Company (fols. 348-349); that they signed the agreement in ignorance of defendant's interest in said corporation (fol. 350); that it was defendant's duty to make a full and complete disclosure of his interest in the United States Iron Company (fol. 351); that upon the discovery of his interest in said corporation the plaintiff and his assignors elected to rescind their subscriptions, and gave notice of such fact to the syndicate managers, and offered to return and restore the stock which each had received, and demanded the return of the money paid therefor (fol. 352); that defendant and the syndicate managers refused to accept the stock and return the money (fol. 353). The referee also found that at the time of the formation of the syndicate, the United States Iron Company was the owner of valuable iron properties in and about Sheffield, Alabama (fol. 2153); that defend-

ant made no statements to the plaintiff and his assignors with intent to deceive, defraud or mislead (fol. 2158); that defendant had not intentionally concealed his interest in the United States Iron Company or his ownership of stock from plaintiff and his assignors (fols. 2163, 2164, 2172, 2179, 2184, 2188, 2193); that no statement or action of the defendant was made for the purpose of leading the plaintiff or his assignors to believe that the defendant was not interested in said property or stock (fol. 2163). He further found that the plaintiff herein and each of his assignors knew that the defendant was largely interested in the formation of the syndicate and in the carrying out of its objects and purposes and was devoting considerable time thereto (fol. 2164). He further found that at a meeting of the stockholders of the Sheffield Coal & Iron Company held on June 9, 1903, the minutes of the annual meeting of the stockholders of the United States Iron Company held on June 10, 1902, were read and approved and that at this last named meeting the plaintiff Sim and his assignor Cluff were present in person and his assignors Coles and Stone were represented by proxy (fol. 2167); he further found that the minutes of the meeting of the stockholders of the United States Iron Company held on June 10, 1902, which were read and approved at said meeting of the stockholders of the Sheffield Coal & Iron Company held on June 9, 1903 showed the defendant's ownership of the stock of the United States Iron Company and the extent thereof (fol. 2169); he further found that at the time of the formation of said syndicate, the United States Iron Company was the owner of valuable iron ore property in and about Sheffield, Alabama (fol. 2153) and that the defendant believed that the operations of the

company which was to succeed the syndicate would be very profitable (fol. 2154); that at the time of the formation of the syndicate the defendant's interest in the United States Iron Company was known to a number of persons interested in the iron and steel industry and that the same had been the subject of publication on September 18, 1902 in the "Iron Age", the standard iron and steel trade paper (fol. 2162); that the plaintiff Sim had heard of the defendant's ore properties prior to the time of subscribing to the syndicate agreement (fol. 2175) and that he had heard of the proposed syndicate from Mr. Cluff before he had any conversation with defendant concerning it (fol. 2177) and that the defendant mentioned to the plaintiff Sim the name of the company the stock of which was to be acquired and where its properties were located (fol. 2177); that the defendant told plaintiff's assignor Mr. Cluff, in 1901, that he had bought out Mr. Gates' interest in the United States Iron Company (fol. 2191); that sometime in the year 1902 Mr. Coles learned that defendant had purchased Mr. Gates' interest in the property of the United States Iron Company (fol. 2196); the referee also found that the Sheffield Coal & Iron Company had become insolvent and that its stock had become practically worthless (fols. 2271-2272) notwithstanding that he found that it owned valuable ore properties in and around Sheffield, Alabama (fol. 2153).

The referee, following the opinion of the Court of Appeals in the case of Hecksher *v.* Edenborn (203 N. Y. 210), held that defendant's failure to disclose his interest in the United States Iron Company operated in law as a fraud on plaintiff and his assignors (fol. 355) and directed judgment in favor of plaintiff for the amount sued for with interest (fol. 358). Judgment was

entered denying defendant's motion for a new trial and in plaintiff's favor for the sum of $94,962.90 (fols. 400-402).

It is clear from an examination of the findings of fact and from the opinion of the referee that he did not believe and did not find that the defendant was guilty of any actual fraud, but based his conclusion that plaintiff was entitled to recover solely on constructive fraud on defendant's part in failing to disclose his interest in the United States Iron Company at the time the subscription agreement was signed. (See opinion of the referee Trans. fols. 374-376, 380, 381, 387).

On writ of error the Circuit Court of Appeals held that the facts found by the referee did not support the judgment entered (Trans., page 862); that defendant performed his duties as manager for and on behalf of the whole syndicate and not for and on behalf of any one subscriber; that he received the subscription of each subscriber on behalf of all and made the contemplated purchase and outlays on behalf of all, and that when the defendant sold his stock in the United States Iron Company to the reorganized Sheffield Coal & Iron Company, he sold it to that company as successor to the rights of all the subscribers to the syndicate; that if there was constructive fraud on Edenborn's part in not informing his subscribers of his personal interest in the stock of the United States Iron Company, the fraud was on the whole syndicate when the purchase was proposed and on the reorganized Sheffield Coal & Iron Company when the purchase was made; and that plaintiff could not restore the defendant to his original position by tendering him the stock plaintiff had received in the reorganized company, which stock represented a proportionate interest in other properties

greatly exceeding in value the amount of the defendant's interest in the original capital of the United States Iron Company (Transcript page 862); that if the syndicate subscribers had any right of rescission that right must be worked out through the purchasing company; that because of the peculiar situation of this case, no right of rescission existed in favor of the plaintiff (fol. 863). The plaintiff thereupon applied to this court for a writ of certiorari, which was granted.

We shall discuss the following questions involved on this certiorari:

(1) No principle of law was violated by respondent in procuring the execution of the syndicate agreement.

(2) No cause of action exists in petitioner's favor for money had and received, because the syndicate and not respondent received petitioner's money.

(3) The only agreement that can be rescinded is the agreement between the syndicate managers and Edenborn.

(4) Petitioner has not offered to place respondent *in statu quo* without which there can be no rescission. The findings of fact set out the syndicate agreement in full and show that it was carried out, but do not show that respondent can be placed *in statu quo*. In fact the findings show that respondent cannot be placed *in statu quo* and for this reason there is error of law in the judgment entered upon the facts found by the referee.

(5) The complaint is demurrable in that it fails to set out the syndicate agreement and fails to show that the circumstances were such that a rescission could be had and fails to show that respondent was placed *in statu quo*, or that petition-

scission could be had and fails to show that respondent was placed *in statu quo* or that petitioner offered to place him *in statu quo,* and that he could be placed *in statu quo.* The complaint was demurrable because there was a defect of parties in that Walker and Mann, the other syndicate managers, were not made parties and in that the Sheffield Coal and Iron Company which succeeded to the rights of the syndicate managers was not made a party.

The suing out the writ of error and assigning error on the action of the court in overruling respondent's demurrer to the complaint bring up for review the sufficiency of the complaint. In addition to this, the question as to whether the complaint states a cause of action is a question of law arising upon the face of the record and is one that is open for the consideration of this court without an exception and without an assignment of error.

The question as to whether or not the findings of fact made by the referee support the judgment entered is a question of law that arises on the face of the record and if the findings of fact do not support the judgment, this is an error of such controlling character this court will notice it even without an assignment of error.

Chicago, Rock Island and Pacific R. R. Co. *v.* Barrett, 190 Fed. Rep. 118;
Seeberger *v.* Schlesinger, 152 U. S. 581;
Guaranty Trust Co. *v.* Koehler, 195 Fed. Rep. 669;
Paine *v.* Central Vermont R. R., 118 U. S. 152;
Roberts *v.* Benjamin, 124 U. S. 64;
Lupton *v.* Auto. Club, 225 U. S. 489, 495;
Chicago, Milwaukee & St. Paul R. R. *v.* Clark, 178 U. S. 353.

BRIEF OF ARGUMENT.

POINT I.

No principle of law was violated by respondent in procuring the execution of the syndicate agreement by petitioner and his assignors.

The referee has found the execution of the syndicate agreement (fol. 347); that at the time of the execution of the agreement by plaintiff and his assignors they had no knowledge of defendant's ownership of shares of stock in the United States Iron Company (fol. 350); that it was defendant's duty at and prior to the signing of said agreement by the subscribers to make a full and complete disclosure of his interest in the United States Iron Company (fols. 350-351). This finding of fact is also stated as a conclusion of law (fol. 354). We think there can be no doubt that this duty to disclose is really and properly a conclusion of law and not a finding of fact. There is no finding that defendant knew that the plaintiff and his assignors were ignorant of defendant's ownership of the shares of stock in the United States Iron Company; on the contrary, the referee found that defendant's interest in the United States Iron Company at the time of the formation of the syndicate agreement was known to a number of persons interested in the iron and steel industry and had been the subject of publication in the "Iron Age," the standard iron and steel paper, on September 18th, 1902 (fol. 2162). This publication appeared before plaintiff and his assignors had paid the whole amount of their subscriptions under the syndicate agreement (fol. 356). The referee found that the

minutes of the meeting of the stockholders of the United States Iron Company held on June 10th, 1902 (which was before any money was paid by plaintiff and his assignors on said subscription) showed defendant's ownership of stock of the United States Iron Company (fols. 2168-69). These minutes were read at the meeting of the stockholders of the Sheffield Coal and Iron Company held on June 9, 1903, and were approved at said meeting. At this meeting the plaintiff Sim and his assignor Cluff were present in person and the assignors Coles and Stone were present by proxy (fol. 2168). The referee also found that plaintiff Sim had heard of defendant's ore properties prior to and at the time of his subscription to the Syndicate agreement (fol. 2175); that the defendant told plaintiff's assignor Cluff in 1901 that defendant had bought out Gates' interest in the United States Iron Company (fol. 2191); that some time in the year 1902 plaintiff's assignor Cole learned that defendant had purchased Mr. Gates' interest in the property of the United States Iron Company (fol. 2197).

Defendant excepted to the 5th finding of fact to the effect that it was defendant's duty to make a complete disclosure to the syndicate subscribers prior to procuring their signatures to the agreement (fol. 2312) and excepted to the first conclusion of law which was to the same effect (fol. 2313); also excepted to the 1st, 2nd, 3rd and 4th conclusions of law (fol. 2313).

Defendant assigned as error the action of the referee in making said sixth finding of fact (fols. 2478-79) and also assigned as error the first conclusion of law made by the referee (fol. 2483); the defendant also excepted to the third conclusion of law to the effect that plaintiff was entitled to recover moneys paid by plaintiff and his assignors

to the syndicate managers on said subscription agreement (fol. 2314) and assigned error thereon (fol. 2485); also assigned error to the action of the referee in directing judgment for plaintiff (fols. 2364-2365).

In the case of Hecksher *v.* Edenborn, 203 N. Y. 210, 219, Judge Hiscock, speaking for the Court of Appeals of this State, in discussing the same agreement as involved in this action, said "there is nothing to indicate that defendant acquired his stock in the United States Iron Company for any such purpose (that is, acquired it at a certain price for the purpose of sale to the corporation and afterwards sold it to the corporation for a much higher price) or that the stock purchased by him and his associate managers in that company was not fairly worth the price paid for it, which was $30 per share less than the price fixed in the syndicate agreement. But broadly speaking, the complainants must rest their claim to relief on the basic principle that defendant induced them ignorantly to execute an agreement which violated the rule that an agent to buy may not purchase of himself."

At page 220, he said: "It (an action to recover based on a rescission) must stand as one directed against the syndicate agreement itself. If that was valid, plaintiff cannot succeed because under it and subsequently defendant did some illegal act in violation of it."

In the same case when before the Appellate Division, Second Judicial Department of the State of New York (131 A. D. 253), Justice Miller in discussing the same syndicate agreement said, "It may be conceded that the defendant was guilty of constructive fraud in purchasing for the syndicate the stock of the United States Iron Company, but the defendant's principal was the syndi-

cate which was succeeded by the corporation, and the right of the syndicate or its successor, the corporation to rescind the purchase of said stock does not give the syndicate subscribers the right to rescind their subscription contract. The contract of purchose of said stock, not the subscription contract, was rendered voidable by the defendant's constructive fraud."

At page 267, he said: "Here we have a case in which no fraud inducing the subscriptions is shown; but only a constructive fraud subsequent to the syndicate agreement upon the syndicate members generally to whose rights a corporation has succeeded. Obviously, in such a case the stockholders cannot in an action at law for damages compel the defendant to purchase their stock. Their action, if they have one, is a representative action."

The Circuit Court of Appeals concurred with the views expressed by Mr. Justice Miller (Transcript page 863).

We cannot persuade ourselves to the conclusion arrived at by the refereee in this case based on the opinion of the Court of Appeals in the Hecksher case. We think the opinion expressed by Mr. Justice Miller (now a judge of the Court of Appeals of this state) in the Hecksher case and concurred in by the Circuit Court of Appeals in this case, expresses the correct view of the law applicable to the facts presented here.

It is well established that the rule of law announced in the Hecksher case is not binding on this court because a question of general jurisprudence is involved in which this court will exercise its own independent judgment (City of Chicago *v.* Robbins, 2 Black, 418; Burgess *v.* Seligman, 107 U. S. 20; Gardner *v.* Michigan Central R. R. Co., 150 U. S. 349, 358).

If A appoints B as A's agent to purchase ten shares of stock of the United States Steel Corporation, 10 shares of stock of the New York Central Railroad Company and 10 shares of stock of the Western Union Telegraph Company, the mere fact that B at the time the contract was made is the owner of ten shares of stock of the United States Steel Corporation does not make the contract by which B was appointed agent either void or voidable. The law was not violated until the stock owned by B was purchased by him as agent for A. Upon subsequently learning the fact A could perhaps keep the stock and sue for damages or even if he had suffered no damage might rescind the transaction, return the stock and recover the amount paid. The transaction upon which the law frowns is the sale by the agent to buy, of his own property, to his principal. So here the syndicate was formed to purchase the stock of the United States Iron Company in which Edenborn owned an interest and also valuable coal and other property in which Edenborn had no interest (fol. 302). The syndicate agreement further provided that the parties hereto hereby form a syndicate to purchase, acquire, use, develop and dispose of the lands and properties above mentioned or so much or such part thereof as in the judgment and opinion of the syndicate managers is deemed advisable and proper" (fol. 306); it further provided "should the syndicate managers in the exercise of their absolute power and discretion hereunder, sell, convey, or transfer any of the money or property acquired by the syndicate, for either cash, bonds, stock or securities, each of the subscribers hereto shall be entitled to receive on the termination of this agreement and the dissolution of this syndicate his *pro rata* share thereof." It further provided "each and all the rights, liabilities, acts, un-

dertakings, powers and authorities of the syndicate manager under this agreement and in pursuance thereof shall control and become operative and in force by the act of assent of any two thereof and each and all matters and things to be done or performed in and under this agreement, and in and by said syndicate, and in and by all depositaries, agents, trustees and all other persons, firms and corporations connected therewith, shall be done and performed and carried out on the request, judgment and direction of the said syndicate managers when done by the act or assent of any two thereof (fol. 320);

When all subscriptions to the syndicate agreement had been procured, that contract became operative and the subscribers became bound each to the other for the amount of their respective subscriptions. If one of the syndicate managers was subsequently guilty of fraud in purchasing for the syndicate property in which he had an interest, that might, under certain circumstances, entitle the syndicate to rescind the purchase, but would not entitle any syndicate subscriber to rescind the syndicate agreement which had previously been made and had become binding upon him. The syndicate agreement could not be rescinded. Edenborn was not the agent of Sim and his assignors at the time they signed the syndicate agreement and became bound by its provisions. The agreement stated its purposes in language clear and explicit and the subscribers thereto were left free to determine whether or not they would execute it. When a subscriber signed the agreement he assumed certain contract obligations not only to the syndicate managers but to the other subscribers. His signature might influence others to subscribe. The subscriber, at the time he subscribed, was representing himself on

one hand and dealing with the syndicate managers on the other. The subscribers could have readily obtained all the information they desired about the ownership of the property if they only asked for it. It was just as much their duty to inquire as it was the duty of Edenborn to disclose without being asked. On the other hand, a fair inference from the findings heretofore set out is that Edenborn believed that the plaintiff and his assignors knew that he was interested in the stock of the United States Iron Company and it is clear that this is the reason he did not speak affirmatively on this subject.

It appears from the syndicate agreement itself that it was discretionary with the syndicate managers whether they would buy Edenborn's interests in the United States Iron Company. The agreement provided that the syndicate managers should purchase the properties therein described or so much or such part thereof as in the judgment and opinion of said syndicate managers was deemed advisable and proper (fol. 306). Under the decision of the Court of Appeals in the Hecksher case, the question of the validity of this agreement must be determined as of the *date* of its *execution* and by what was known and done by the parties prior to and at that time and not by what was subsequently done by Edenborn and the syndicate managers. Suppose Edenborn had not purchased the stock of the United States Iron Company, but had purchased stock or property in which he had no interest, as the syndicate managers were authorized to do by the terms of the agreement, and that this purchase of such other property was afterward fully carried out and a heavy loss sustained, could the plaintiff have rescinded the original syndicate agreement after such purchase simply because the syndicate

managers had been empowered by the agreement to purchase Edenborn's property? The Court of Appeals says the plaintiff could have rescinded the syndicate agreement under such circumstances; we say not. The fact that the syndicate of which Edenborn was a member was composed of two other members not controlled by Edenborn (fols. 2166, 2246) and that the decision of any two of such members controlled with respect to the subject matter of the syndicate, coupled with the fact that the syndicate agreement authorized the syndicate managers in their discretion to purchase certain property from one of such syndicate managers, is not alone sufficient to justify the setting aside of the syndicate agreement on the ground of constructive fraud based on the fact that the syndicate manager who owned such property failed to disclose his ownership therein at the time of the signing of the syndicate agreement. Suppose Mr. Walker, one of the syndicate managers, had solicited Mr. Sim to subscribe to the syndicate agreement just as was done by Mr. Edenborn, and then suppose that the syndicate managers had in the exercise of their discretion under the agreement, decided not to purchase Mr. Edenborn's stock in the United States Iron Company, but had purchased other property not owned by Edenborn, could Sim rescind, after discovering that Edenborn owned a large part of the stock of the United States Iron Company, simply because the syndicate agreement conferred such discretionary power on the managers and because Mr. Walker had not informed him of Edenborn's ownership in the stock of the United States Iron Company at the time of soliciting his subscription? It clearly appears that there is no constructive fraud in the procuring of the execution of this

agreement, for the reason that it can be carried out without purchasing Edenborn's property. It can be executed without operating as a legal fraud on the subscribers. The presumption must be indulged that at the time of the execution of this agreement the syndicate managers intended to discharge their duty to the subscribers and would do everything required of them by law in carrying out the terms of said agreement. It cannot be assumed that at the time of procuring the execution of the syndicate agreement, the syndicate managers intended to violate the law. It must be assumed that they would not, as syndicate managers, exercise their discretionary power to purchase Edenborn's property without communicating such ownership to the subscribers and having them sanction such action. It must be assumed that in the event they decided to purchase and did purchase such property they would inform the subscribers of their intention to purchase property in which Edenborn had an interest, or after such purchase would refer their action to the subscribers for ratification after fully informing them of the facts.

Suppose the managers under this agreement, which authorized them in their discretion to purchase Edenborn's property, had decided to purchase said property and had prior to such purchase referred their action to the subscribers for approval and then Mr. Sim, for the first time learned that Edenborn owned an interest in such property, could Sim rescind the agreement because it authorized the managers in their discretion to purchase such property after the subscribers had decided not to approve the plan of the syndicate managers and after the syndicate managers thereafter changed their plans and decided not to pur-

chase said property? The holding that the syndicate agreement can be rescinded under such circumstances involves the assumption that the syndicate managers in carrying out the terms of the syndicate agreement would violate their duty to the subscribers when the law presumes the contrary, if the contrary can be done under the terms of the agreement. The syndicate agreement can be carried out without violating the law, without any breach of trust by the syndicate managers even in the purchase of Edenborn's property. Therefore, this syndicate agreement cannot be rescinded on the ground that Edenborn was guilty of constructive fraud in procuring its execution by Sim. It is only a breach of duty under the agreement that can be set aside, not the agreement itself; hence the rule laid down by the Court of Appeals of the State of New York in Hecksher *v.* Edenborn is manifestly wrong.

The right, in the discretion of the syndicate managers to purchase Edenborn's property, does not constitute a violation of the rule of law that an agent to buy cannot buy of himself. If the syndicate managers had purchased Edenborn's property without knowledge of the facts then the syndicate managers could have rescinded the transaction or the corporation subsequently formed could have rescinded and any subscriber after calling upon the syndicate managers or the corporation to bring the action and their refusal so to do, could maintain a representative action for this purpose. If the sale was rescinded, Mr. Edenborn would be required to return to the corporation what he had received and would receive back that with which he had parted and as the corporation would be a party to or represented in the action, there would be no insurmountable difficulty in making the necessary adjustment to

place Mr. Edenborn in the position in which he was before the sale occurred. This would obviate the situation which the Court of Appeals concedes to be inequitable in this case and which it states might lead to almost absurd results where the property improperly purchased was smaller in proportion to the entire property acquired than here. This difficulty, however, the Court of Appeals dashes aside with the statement that it does not see how this result can be avoided.

POINT II.

The findings do not support the judgment because they show that the moneys were paid by plaintiff and his assignors to the syndicate managers as such and not to the defendant.

The Referee found at the request of the defendant as follows:

"That all the managers of said syndicate acted in carrying out the syndicate agreement and that the subscriptions of the plaintiff and his assignors were paid to and received by all of said managers as such" (fols. 2166-2167, 352, 353). This finding follows the terms of the agreement itself (fols. 307, 311, 313, 320). On the findings of fact the Referee based a conclusion of law that the plaintiff was entitled to recover the sums of money paid by the plaintiff and his assignors. The defendant excepted to this conclusion of law (fol. 2414) and assigned error thereon (fol. 2485).

We contend that plaintiff was not entitled to recover anything in this action because the finding

showed that the defendant never received any money from plaintiff or his assignors, except as the manager of the syndicate and this money evidently went into the possession of the Sheffield Coal & Iron Company either in the shape of money or property (fols. 359, 2166).

When a party has been induced by fraud to enter into a contract, he has two actions at law—one based on a rescission and the other for damages—but he cannot resort to both, for they are inconsistent; or he may sue in equity for a rescission, in which event an accounting takes the place of damages. This is an action for money had and interest based on a prior rescission of the syndicate agreement for fraud. The plaintiff below elected to stand on his cause of action based on a rescission (fols. 1530, 1531); that is, he claimed that he had rescinded the contract on account of fraud, and offered to return to the syndicate managers the stock of the Sheffield Coal and Iron Company, and demanded of them the return of the money which they had paid to the syndicate, and which this defendant never received in his separate and individual capacity or for his personal use and benefit. By this act, the person defrauded resumes in law the ownership of the consideration with which he parted, as the result of the fraud, and the law implies a promise on the part of the person to whom he paid it to return it, because such person holds it without having paid any consideration therefor. Such party may then, in a proper action, as for money had and received, recover back from the party guilty of the fraud whatever he may have paid him.

It is well settled that an action to recover back moneys paid upon a contract repudiated by one party thereto on the ground of fraud is based on the promise to pay implied by law and is therefore

an action for money had and received. (Freer *v.* Denton, 61 N. Y. 492, 495; Byxbie *v.* White, 24 N. Y. 607; Heckscher *v.* Edenborn, 131 A. D. 253; Gould *v.* Cayuga Bank, 86 N. Y. 75; Lambert *v.* Elmendorf, 101 A. D. 758; Wilson *v.* U. S. Cattle Ranch Co., 73 Fed. 994; Bridge *v.* Penniman, 9 Jones & Spencer, 183.)

After a rescission, the party rescinding has waived the tort except as a basis for proving a rescission, and cannot bring an action for damages based on the tort. The purpose of the action after a rescission is not to recover damages but to make the party disgorge what he has fraudulently obtained and the recovery must necessarily be limited by the party's enrichment from the alleged fraudulent transaction.

The undisputed evidence and the findings show that this money went through the syndicate (fol. 2166), of which Edenborn was a member, to the Sheffield Coal and Iron Company, and that this company had the whole beneficial interest in this money and property. The fact that plaintiffs, because of Edenborn's fraud as an individual paid money to the syndicate of which Edenborn was a member, but for the use and benefit of a third person or corporation to which it was paid in good faith before rescission, does not entitle plaintiffs, the defrauded parties, to recover from Edenborn the money they have parted with in an action at law based on a rescission.

Before an action can be sustained for money had and received, it must appear that the person who is sued received the money for his own benefit (N. Y. Guardian Co. *v.* Gleason, 78 N. Y. 503; Phoenix Bridge Co. *v.* N. J. Iron Co., 30 A. D., 614; Cyc., Vol. 27, p. 860.) Not a dollar of plaintiff's money was ever received by Edenborn, except as a syndicate manager. Not a dollar of the

money of any of the subscribers to the syndicate was ever received by Edenborn. It all went to pay for property in which Edenborn had no interest, and which was transferred to the Sheffield Coal and Iron Company. Strictly speaking, none of it was used to acquire Edenborn's stock holdings in the United States Iron Company. For his interest in the stock of the United States Iron Company amounting to $536,500, he received $375,550 in the stock of the new company. Every dollar of the plaintiff's money, along with that of the other subscribers, was used in the purchase of other property in which Edenborn had no interest. Of course, if this were an action to recover damages sustained by the plaintiff on account of defendant's fraud, it might be sustained as it would not be necessary to show that the plaintiff received any benefit from the transaction, but in every action based on a rescission for fraud of one of the parties, it is necessary to show that the party sued received the money. There is no pretence in this case that the defendant received this money except as the representative of the blast furnace syndicate to whom it was immediately delivered, and for this reason we insist that the judgment cannot stand. The referee does not find that Edenborn personally received this money, but only that the syndicate received it (fol. 2166).

POINT III.

The only agreement which could be rescinded is the agreement between the syndicate managers and Edenborn for the purchase of his stock in the United States Iron Company.

If there was any profit made by Edenborn out of the contract for the sale of his interest in said stock of the United States Iron Company to the syndicate, and if this contract was not ratified by the corporation or by the subscribers to the syndicate, the contract might have been rescinded. This transaction, however, could be rescinded only by all parties to it and upon restoring to Edenborn everything he had parted with, and such other parties would then be entitled to recover only what they actually paid to Edenborn. Probably no one member of the syndicate would be entitled even in that case to avail himself of the right to rescind, for that purchase was made on behalf of the syndicate as a whole, and while some of its members might wish to rescind, the other members might not be entitled to do so, or might not desire to do so. The syndicate agreement is one between all of the subscribers to the syndicate to do those things which the syndicate agreement provides for doing. In addition to that, it is an agreement between all of the subscribers and three managers of the syndicate who have been chosen to act for and on behalf of the entire syndicate, vested with certain powers and having enjoined on them certain duties and sustaining certain definite legal relations to the subscribers. We insist that the attempt made at rescission in this case has not

reached and cannot reach the only transaction which in our opinion is legally capable of rescission. The syndicate managers to whom is entrusted certain powers and duties purchased Edenborn's interest in the stock of the United States Iron Company (fol. 2259) though it is stated in the referee's first finding of fact that Edenborn owned this stock until he transferred it to the Sheffield Coal & Iron Company in December, 1902 (fols. 346, 2160); the syndicate managers also purchased the Mann property (fol. 2274); they also purchased coal property in Virginia and purchased blast furnace property (fols. 302, 304, 351, 2167). After the subscription by plaintiff, the name of the United States Iron Company was changed to that of the Sheffield Coal & Iron Company and the capital stock increased from $1,000,000 to $2,500,000—and plaintiffs received the exact amount of their subscriptions to the syndicate agreement in stock of the Sheffield Coal and Iron Company at par (2268). This stock was evidently a part of the 25,000 shares of stock that the syndicate managers directed the Sheffield Coal & Iron Company to distribute among the subscribers to the syndicate agreement in amounts equal to the amounts of their respective subscriptions (fol. 2270); the syndicate, acting through its managers, acquired the Edenborn stock in the United States Iron Company. It did not acquire this stock any more nor any less than it acquired the coal property or the blast furnace property. The only transaction which is capable of rescission, if the facts warrant it, is the contract by which Edenborn's individual stock in the United States Iron Company passed to the syndicate or to the Sheffield Coal and Iron Company through the agency of the syndicate managers. Defendant's subscription to the syndicate agreement was for $500,000 and was subse-

quently reduced to $475,000 (fol.) and at that time he owned 5365 shares out of the total outstanding capital stock of the United States Iron Company of 9,250 shares, and in part payment of his subscription he transferred the said 5,365 shares of stock in the United States Iron Company to the syndicate at $70 per share (fol. 2259); in other words, it is conceded that the stock of the United States Iron Company was purchased for the sum of $647,000 and Edenborn's interest in said stock was purchased for $375,550 (fol. 2259). The total capitalization of the new company was $2,500,000. The purchase of the stock of the United States Iron Company owned by Williams of 518 shares (fol. 2263) and by Elwood of 2201 shares (fol. 2257) is not condemned because of any trust relationship which they sustained towards the syndicate subscribers. It is not claimed that the purchase of the remainder of the property by the syndicate should be set aside because of anything done by Edenborn. The remainder of the money subscribed—about $2,000,000.—went into equipment, blast furnaces, coal lands and other property. The Court of Appeals said, in the case of Heckscher *v.* Edenborn, 203 N. Y. 210:

"Of the $2,500,000 subscribed, $647,500 in effect was expended for purchasing the entire capital stock of the United States Iron Company at $70 per share" (p. 215).

Edenborn's stock was included in this purchase. Continuing, the Court said:

"The balance of the aggregate subscriptions, with the exception of something over $900,000, which was reserved for future use, was expended in purchasing other properties. As has already been indicated, respondent purported to pay his subscription of $500,000 to a large extent by turn-

ing in his holdings of the capital stock of the Iron Company at $70 per share" (p. 215).

So we have $2,124,450 of the total $2,500,000 of capital stock subscribed concededly going into property under the direction of syndicate managers or their successor the corporation, about the purchase of which there can be no objection. An action in equity against William Edenborn alone for a rescission of the syndicate agreement could not be successfully maintained and we do not think that an action at law by a subscriber based on a rescission could be successfully maintained against Mr. Edenborn alone. The Court of Appeals further said (page 230):

"The agreement authorizing the purchase and organization of various properties was an entire one. The conclusion has been reached that so far as it authorizes the purchase of or related to defendant's property, it was constructively fraudulent, even though there was no actual fraudulent motive on his part."

To say that the syndicate agreement, when signed by a subscriber, was in any sense fraudulent because it authorized the purchase of Edenborn's property, in our opinion, misconceives or misunderstands the point. It was perfectly legitimate for the syndicate agreement to provide for the purchase of Edenborn's property as heretofore discussed. It was perfectly legitimate for him to procure signers to that agreement. This agreement at no time ever became subject to rescission for fraud. The fact is that the fraud occurred, if at all, not when the syndicate agreement was signed, but when the syndicate purchased Edenborn's stock. It was this additional step that made the transaction constructively

fraudulent. Therefore we cannot assent to the statement in the opinion of the Court of Appeals—that the syndicate agreement was constructively fraudulent. Judge Hiscock further says: "I see no way by which the instrument can be subdivided." See what a far-reaching result this would be: $2,124,450 worth of other property, purchased by the syndicate, to which no objection can be made by any one, is claimed to be affected by Edenborn's act. Yet if this decision is followed, Edenborn is not only compelled to rescind the arrangement by which he and his associates got his property and turned it over to the syndicate but he is compelled to return to the stockholders $2,124,450.00 worth of stock which had concededly no fraudulent connection with his failure to disclose his interest in the stock of the United States Iron Company. If this is correct, Edenborn is bound to take the stock of every individual in this corporation who comes before the Court and swears that he did not know that Edenborn was the owner of this stock. Plaintiff claims that defendant was his agent and that he could therefore rescind not the transaction by which the agent's property was purchased, but the very transaction in which he was appointed his agent. On the other hand, we assert that he never was the agent of plaintiff, certainly not until after the syndicate contract was made, and that even then the syndicate as a whole was the principal and that the syndicate managers were the agents of the syndicate only and not of each individual subscriber. The Sheffield Coal and Iron Company succeeded to all the rights of the syndicate and it is through that company, if at all, that the purchase of Edenborn's property may be rescinded. Prior to the transfer of the property to The Sheffield Coal & Iron Company the rescission could

have been effected by the syndicate as a whole if the facts justified it. Similar situations have frequently arisen, but usually in cases where a fraudulent profit was made in the transaction, and the books are full of cases where some individual undertook to obtain subscriptions to an agreement to buy property and turn it into a corporation and where it subsequently developed that such person was interested in the property sold or had obtained some profit out of the transaction which he had failed to disclose. But no case can be found in which, as here, the subscriber has been allowed to rescind his subscription contract by tendering to the agent or promoter stock not received from him and recover back the amount of the subscription which was not paid to him. What then are the remedies which a subscriber to the stock of the corporation has under such circumstances?

1. If the subscriber has been induced by fraud to subscribe, he may have an action in the nature of deceit against the one who has made the false representation.

2. If the subscription to the stock was induced by a false representation made by the agent of the corporation, the subscriber may bring an action against the corporation for the purpose of rescinding the subscription, or could, perhaps, surrender his stock to the corporation and demand back the money paid for it.

3. If the agent has merely failed to disclose his interest in property sold to the syndicate or corporation, or has made a secret profit in connection with such sale, the action belongs to the corporation, which, under proper circumstances, may either rescind the sale, returning the property purchased and receiving back the money or stock

paid therefor, or it may compel him to account for the profit obtained by such sale. In case the corporation does not undertake to sue of its own motion, a stockholder may bring suit joining the corporation as a party defendant.

In each of these cases the amount of damages is carefully restricted to the profits made by the promoter, and if a rescission is permitted, only the sale of such property as has been actually transferred by the promoter to the corporation is abrogated, and the amount paid for such property is returned to the corporation. If the plaintiff desire that the sale of Edenborn's property to the syndicate should be rescinded, he should have brought his action, joining the corporation as defendant in case the company refused to take such action itself. It may be that he was unwilling to pursue that course because the property sold by Edenborn was of such value as to make it unwise to return it to him. If it were true that Edenborn had made any profit out of the transaction, that could be recovered in the same manner. If Edenborn had induced plaintiff to subscribe to the syndicate agreement by fraudulent representation the plaintiff could recover his damages in an action for deceit. Although, in view of the fact that by the syndicate agreement the subscribers expressly authorized the purchase of this specific property, it is doubtful if they would be entitled to recover in any form of action unless they could show actual fraud or secret profit obtained by defendant. (Hutchinson *vs.* Simpson, 92 A. D., 398; Blum *vs.* Whitney, 185 N. Y., 240).

POINT IV.

Plaintiff and his assignors did not offer to and did not place defendant in statu quo.

The referee found the existence of a syndicate agreement (fol. 347); that the consolidation proposed in said agreement was carried out (fols. 351, 2160); that the subscriptions of the plaintiff and his assignors were paid to and received by all of the syndicate managers as such (fol. 2166, 2167); that the plaintiff and his assignors elected to rescind, notified the syndicate managers, and offered to restore and return the stock which each had received and demanded the return of their money (fol. 352); that defendant's failure to disclose his ownership of the stock of the United States Iron Company operated in law as a fraud on plaintiff and his assignors (fol. 355); and that plaintiff was entitled to recover the sums paid him, with interest (fol. 356). The defendant excepted to these findings. (See exception No. 6, fol. 2312; exception No. 8, fol. 2313; exception No. 10, fol. 2314; and assigned error on this action of the court, fols. 2480, 2483, and 2485).

In the case of Grymes *v.* Sanders, 93 U. S. 55, the United States Supreme Court said:

> "A court of equity is always reluctant to "rescind unless the parties can be placed in "*statu quo.* If this cannot be done it will give "such relief only where the clear and strong- "est equity imperatively demands it."

The general doctrine of rescission has been clearly stated by the Court of Appeals in the case of Cobb *vs.* Hatfield, 46 N. Y. 537, where Judge Allen said:

"The law not only requires a disaffirmance "of the contract at the earliest practical "moment after discovery of the cheat but a "return of all that has been received under "it and the restoration of the other party to "the condition in which he stood before the "contract was made."

In the case of Francis *vs.* N. Y. & B. L. R. R. Co., 108 N. Y., 97, Judge Finch said:

"The theory of rescission is that the party "proceeded against shall be restored to his "original position."

And he further held under the facts of that case that the alleged rescission was ineffective because it was "very far from restoring the company to its original position."

In the case of Curtis *vs.* Howell, 39 N. Y. 215, the Court of Appeals said:

"When the power to restore ceases, the "right to rescind ceases."

The case of Getty *vs.* Devlin, 54 N. Y., 403, is directly in point, although that was a case of gross actual fraud and was a suit in equity. In that case four persons, owning certain oil land which had cost them about $30,000, agreed to combine their interests, to organize a company and transfer their interests to the company at a large price above the cost and to divide the profits. To carry out his purpose they procured a subscription paper to be drawn up by which the subscribers agreed to pay the sums subscribed for the purchase of property, specifying therein the lands above mentioned, at the sum of $125,000. Each of the four persons interested in the property subscribed $5,000 and caused certain others to sign as decoy subscribers for about half the

amount subscribed. These subscriptions were not in fact paid, although so marked and it was never intended that they should be paid. The plaintiffs, induced by the fraudulent assurances of one of the originators of the scheme that the land originally cost $125,000, and upon the belief that they became subscribers on a footing of equality with the others, subscribed and paid in their subscriptions. The moneys so paid were received and divided by the four associates. The company was thereupon organized, the property transferred to it, and stock taken in payment and divided *pro rata* among the subscribers, as well those who had not as those who had paid.

The court expressly held that the plaintiffs could not, on account of the fraud, recover back money paid by them, because they could not restore the four defendants to the position they were in before the transfer of the real estate, and that by returning the shares of stock which they held in the company which had taken title to the real estate, they did not put the four defendants in the position which they originally occupied, because what the defendants parted with was the real estate, and that had passed beyond their control. But, this being an action in equity, the court held that the defendants might be compelled to account for the profits they had made upon the real estate and which they had fraudulently appropriated to the exclusion of their associates. The court, after considering the gross fraud of the defendants and stating that the plaintiffs were entitled to relief in some form said, with peculiar pertinence to this case:

> "They could not, on account of the fraud, recover back all the money paid by them, because they could not restore the four defendants to the position they were in before the

transfer of the real estate to the company. The real consideration for the money subscribed and paid was the real estate which was conveyed to the company at the request of the subscribers. The company took the title to the real estate, and then their interest in the company and through it in the real estate was represented by shares of stock. The plaintiffs did not place the four defendants in the position they were before the real estate was conveyed, by returning their stock, because what the defendants parted with was the real estate, and that had passed beyond their control. The plaintiffs caused it to be seized and sold for their debts against the company, after the discovery by them of the fraud of which they complain. It is a rule, quite uniform, that a party who seeks to recover back money which he has been induced to pay for property by fraud, must restore the property before he can rescind the contract of purchase and recover the money paid. And he must act promptly upon the discovery of the fraud (Cobb *v.* Hatfield, 46 N. Y. 533; Masson *v.* Bovet, 1 Denio, 69; Moyer *v.* Shoemaker, 5 Barb., 319). It matters not, so far as I can discern, that it is difficult or even impossible for him to do so, so long as he is not prevented by the act of the wrongdoer. Before he can adopt this form of remedy he must do it, and the action in such case may be at law. All the defrauded buyer has to do is to tender back what he has received, and then he can commence his action at law to recover the money paid. In this case, if the tender of the release of the stock was sufficient, no resort to equity was necessary or proper, as each one of the plaintiffs could at once, after the tender, have sued in an action at law to recover the amount of money paid by him. A joint action by all the plaintiffs would not have been proper. Hence, this action cannot be maintained for the recovery of the entire amounts paid by the plaintiffs,

upon the theory that they have restored to the four defendants all that they parted with for plaintiff's money."

Vail *vs.* Reynolds, 118 N. Y. 297.
Hammond *vs.* Pennock, 61 N. Y., 145.
Pullman *vs.* Alley, 53 N. Y., 637.
Gould *vs.* Cayuga Nat. Bk., 86 N. Y., 75.
Hogan *vs.* Weyer, 5 Hill, 389.
Bedell *vs.* Bedell, 3 Hun, 580.

The English cases on the question of rescission are uniform and in accord with the authorities cited in this State.

In *Re* Cape Breton Co., 19 Ch. D., 77, the court held:

"In 1871 certain coal areas were purchased for £5,500 by six persons, of whom F. was one, and were vested in G. as a trustee for them without disclosing the trust. In 1873 a company was formed for the purpose of purchasing these areas and other property. F. was one of the directors, and as such he concurred in effecting a purchase by the company fom G. for £12,000 cash and £30,000 in fully paid-up shares, without disclosing the fact that F. was a part owner. In 1875 the company was ordered wound up. In 1878 a meeting of the contributories was called, at which two rival schemes were brought forward, one for repudiating the purchase of the coal areas, the other for adopting the purchase and selling the property. The latter scheme was adopted and was confirmed by the court. The liquidator accordingly sold the property, but at a heavy loss. A contributory then took out a summons under sect. 165 of the Companies Act, of 1862, to make F. liable for misfeasance as a director in allowing the company's seal to be affixed to the agreement for purchase by the company. Mr. Justice Pearsons dismissed the summons,

holding that though the company would have been entitled to rescind the contract, yet as rescission had become impossible, no relief could be given against F.

Held, by Cotton and Fry, L. JJ., *dissentiente*, Bowen, L. J., that this decision was right.

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Cotton, L. J. "* * * It is material on that part of the case to consider what I have already mentioned—that the company was expressly formed for the purpose (among other things) of acquiring this particular property. The directors therefore were not acting under a general authority to buy property. If they had been, it might be said that when an agent does not buy, but hands over to his principal property of his own, he has not performed the commission entrusted to him. No authority has been quoted to show that even in that case a director would be liable to an action by any shareholder for not having performed the duty which was entrusted to him by the company, and in my opinion such an action could not be maintained. There could be no action at law, and it cannot be considered that a contributory can acquire a right to bring in substance such an action by taking out a summons under sect. 165. Subject to what we might hear in arguments, for we have not heard the respondents on this point, and assuming that the whole circumstances were not in fact known to the board and to the company at the time of the purchase, the company, if so minded, might have set aside this purchase altogether. Where a trustee purchasing on behalf of his *cestui que trust*, purchases his own estate without disclosing his own interest in it, the *cestui que trust* when he discovers the fact, may, if he pleases, set aside the contract altogether, but then he must return that which has been purchased. The same rule applies in the case of a purchase by a director on be-

half of a company, of property in which he has any interest: if the company repudiates the contract, the property must be returned. In this case a return of the property is impossible after what was done in 1878."

Bentinck *vs.* Fenn, 12 App. Cas., 658:

Lord Herschell,

"Now there can be no doubt that inasmuch as Mr. Fenn was interested with his partner Mr. Crosthwaite to the extent of three-tenths of the value of these three coal areas, holding three-tenths of the shares in the Coal Area Association Limited, he was bound to disclose that interest to the other directors of the new company who were entering into a contract for the purchase of them, and his failure to make that disclosure would entitle the company, upon discovering his interest, to rescind the sale. I think about that there can be no manner of doubt, but at the present time rescission has become impossible. * * *

"Again, there probably is little doubt that if an agent of a company is employed by that company to make a purchase for them in the market of goods of any description, and if instead of making that purchase in the market at the market price he sells to his company goods of the required description which he happens to own, at a price in excess of the market price, he can be made to pay to the company that excess, so as to leave their purchase, as it ought to have been, at the market price according to the obligations which he is under to them. But in the present case the purchase that was made was a purchase of specific property, it was that specific property alone which the agent, the director, was authorized to purchase; it was not left to him to purchase, at the best price at which they could be obtained, goods or land of a particular description, but his agency, so far as it existed at all, was an agency to purchase this

specific property in which it is proved he had an interest.

"Now, I am by no means prepared to say that the argument of the appellant is well founded that such a case as this is a parallel case to the class of cases to which I have alluded, where an agent employed to go into the market and buy at the market price sells his own goods to the company at something above the market price. But I do not think it necessary to come to any absolute determination upon that point, because it is of the very essence of such a case as this to show that the price at which the property was sold to the company was in excess of what has been called the real price or the true value. Now what evidence is there here, upon which your Lordships would be entitled to act, that the property in question when purchased by the company was sold to them at a price in excess of the real value, or the market value or the true value in which ever way you put it? I admit that there may be considerable ground for suspicion that the price was in excess of it. But obviously for such a case as the appellant seeks to make out here much more than that is necessary. It is of the very essence of the case, which rests upon his proving what he claims, namely a secret profit improperly made, that he should prove that there has been that excess which he alleges. * * *"

Ladywell Min. Co. *vs.* Brookes, 35 Ch. D. 400:

"On the first of February, 1873, five persons (one of whom was a solicitor and conducted the negotiations) purchased a leasehold mine for £5,000 with a view of reselling it to a company to be formed; but they had at that time taken no steps to form any company. They completed their purchase on the 17th of March, 1873, the purchase money being paid out of their own moneys, and on the

4th of April they entered into a provisional contract with a trustee for an intended company for the sale of the mine to the company for £18,000. On the 8th of April, the company was registered under the Companies Act, its principal object being, as stated in the memorandum of association, the purchase of the mine, and in its articles the contract of the 4th of April, 1873, was adopted and confirmed, and four of the vendors were named as directors; but the contract of the first of February, 1873, was not disclosed to the company. The whole of the shares were placed by the vendors, and the share capital (£30,000) paid by them. At the same time they received £18,000 from the company as the purchase-money for the mine. In 1882 the company was wound up voluntarily, and in the course of the winding-up the facts relating to the purchase of the mine by the vendors became known to the company. In 1883 the company allowed judgment by default to go against them in an action by the lessor to recover possession of the mine. In 1884 the company commenced two actions against the executors of three deceased vendors and the two surviving vendors to recover the secret profits made by the vendors on their sale to the company, on the ground that they stood in a fiduciary position to the company:

Held (affirming the decision of Stirling, J.), first, that the evidence did not prove that the vendors when they purchased the mines were promotors of, or in a fiduciary position towards the company which was ultimately formed; secondly, that assuming that the vendors committed a breach of duty in not informing the company after it was formed that the mine was their own property, and consequently that the company might have rescinded the contract, yet as rescission was now impossible, the company could not recover from them the profits which they had made. The action was accordingly dismissed."

In Re Lady Forest Gold Mine (1901), 1 Ch., 582:

"A syndicate, of which S. was a director and member, was formed in February, 1895, to acquire and work a mine, and in the same month issued a prospectus showing that the directors were aware that similar properties were often resold 'to the public' at a profit, and were 'not unmindful of the benefit that' might 'arise by converting the syndicate into a very much larger company within a short period.'

In October, 1895, the directors promoted and brought out a company, with a larger share capital than that of the syndicate, to purchase the mine on the terms of an agreement, already entered into in the same month with a trustee for the company, which provided for the payment of a purchase money much larger than what had been paid for and expended upon the mine by the syndicate. The same persons were the directors of both the syndicate and the company. In the same month the company issued a prospectus offering some of its shares for public subscription and stating the names of its directors that they were directors of the syndicate selling to the company, and the date of, parties to, and consideration for the sale to the company. Inspection of the contract was also offered. The amount of profit on the resale to the company was not stated, and subject as aforesaid, there was nothing in the prospectus to show that the sale was at a profit.

The court found as a fact that when the syndicate acquired the mine it had no present intention of reselling to or forming another company, but contemplated working it in the first instance.

In the winding-up of the company it was sought to make S. liable on a misfeasance summons for the secret profit received by him as a promoter of the company.

Held, (1) that the syndicate and its directors were not promoters of the company when the syndicate acquired the property.

(2) That the disclosure in the prospectus of the company of the fact that the directors of the syndicate were directors of the company was a disclosure that some profit was being made.

(3) That S. and the other directors were guilty of a breach of duty in not disclosing what profit had been made on the resale to the company.

(4) That although the company might have had a right to rescind the contract S. could not be ordered to repay the profit which he had derived from the resale to the company.

Gluckstein *v.* Barnes, (1900) A. C. 240, distinguished.

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"There is the decision of the other two members of the Court of Appeals in Re Cape Breton Co., (1) which has been sometimes explained as proceeding upon peculiar facts; there is the case of Ladywell Mining Co. *vs.* Brookes (2) which has not been so explained; and there is the statment of Lord Cairns in Erlanger *vs.* New Sombrero Phosphate Co.— (3) all of which appear to me to go to this result: that although there is a breach of duty in such a case sufficient to entitle the vendee company to rescind or repudiate the contract if matters have not been too much altered in the meantime, nevertheless there is sufficient ground for requiring a person in the position of Mr. Simpson to repay the profit or the benefit that he has received out of the sale. It is quite true, I think, that the cases on which so much reliance has been placed on Mr. Simpson's behalf have been to some extent doubted, perhaps even questioned, in later cases, and certainly some of them have been more or less criticised, but they have been cited and discussed and have not been expressly dissented from, still less overruled, in any case to which I have been referred."

The stock which the plaintiff and his assignors offered to deliver to the defendant never was the property of the defendant and he never had any interest of any kind therein. The defendant Edenborn never owned plaintiff's subscription to the syndicate agreement, yet plaintiff and his assignors have obtained a judgment which in effect compels Edenborn to purchase or take off plaintiff's hands the shares of stock which they purchased in the Sheffield Coal & Iron Company. Whatever the plaintiff and his assignors may do in this case may be done by all the subscribers to the syndicate agreement who can show that they did not know of Edenborn's interest in the stock of the United States Iron Company at the time they subscribed. If this judgment can be sustained then Edenborn can be compelled to accept and pay for the stock of all the other subscribers amounting to two million dollars. He can be made to accept the ownership of stock for which he never contracted and which he never at any time owned and in which he never at any time had any interest. Before the syndicate agreement he owned 5,365 shares of the stock of the United States Iron Company which was turned in to the Sheffield Coal & Iron Company for $375,550. After a rescission by all the subscribers, in the event they should decide to rescind, as has been done by plaintiff below in this case, Edenborn would own all of the stock of the Sheffield Coal & Iron Company. This same result would be reached although his interest in the United States Iron Company amounted to only one thousand dollars; that is if his interest in the stock of the United States Iron Company had amounted to only $1,000.00 the other subscribers could under the rule of law announced in the Hecksher case compel the defendant to take

over their subscriptions amounting to $2,449,000. The parties could not be placed in *statu quo* by rescinding the subscription contract between defendant and plaintiff because it is now converted into shares of the Sheffield Coal & Iron Company and that company is the only party liable in an action for rescission, if one can now be sustained.

When the subject matter of a contract has been so dealt with that the court cannot place the parties in their original state there can be no rescission but the parties must be left to an action for damages.

Furness *vs.* Grove, 12 How. 51.
Murray *vs.* Watson, 8 Cow. 238.
Curtis *vs.* Howell, 39 N. Y. 211.
Padden *vs.* Taylor, 44 N. Y. 371.

The court instead of restoring to defendant Edenborn the $375,550 worth of property which he put into the enterprise, and, as the law requires, putting him in *statu quo,* would compel defendant Edenborn to enter into a new contract by which he is to become the subscriber to two million dollars of stock, in addition to the $375,550 worth of property which he put into the enterprise and the additional stock for which he paid in cash. Instead of putting him in *statu quo,* the court would in this manner make him the sole owner, with one or two exceptions, of all the stock of the Sheffield Coal & Iron Company, and this notwithstanding the fact that all of the property which was purchased by the syndicate outside of the stock of Edenborn in the United States Iron Company was property in which Edenborn had no interest whatever.

The remedy of rescission is an equitable remedy resorted to for the purpose of doing equity, and

not for the purpose of perpetrating a wrong and hardship. The referee has found that the syndicate agreement was entered into in good faith on the part of defendant, (fol. 2154); that no statements were made by defendant with the intent to deceive, defraud or mislead plaintiff or his assignors (fols. 2158, 2172, 2179, 2184, 2188, 2193); that the defendant did not intentionally conceal his interest in the United States Iron Company from the plaintiff and his assignors (fols. 2163, 2164).

We submit that it was Edenborn's duty as well as that of the syndicate managers who represented plainiff and his assignors to carry out the syndicate agreement. It was entered into in good faith by Edenborn, without any intent to conceal his interest in the stock of the United States Iron Company; it is evident from the findings that Edenborn believed that plaintiff and his assignors knew all about his interest in the United States Iron Company; the provisions of the agreement were carried out in good faith by Edenborn and every member of the syndicate at a time when the agreement was in full force and effect. It is submitted that plaintiff's attempted rescission cannot operate so as to invalidate as between plaintiff and defendant, what was done under that agreement. The plaintiff was represented by the other syndicate managers, who had no interest in the United States Iron Company and who could control the action of the syndicate with respect to the propriety of the purchase of Edenborn's stock.

We contend that the rule announced by the Court of Appeals that defendant cannot set up the syndicate agreement to justify acts done under it and to prevent a rescission after plaintiff has taken advantage of the right to rescind, is mani-

festly erroneous. This might be the proper rule in some cases but should not apply to a case where there was no attempt to deceive or conceal; where the fraud, if any, resulted only by operation of law. We think rescission cannot be accomplished here because defendant cannot be placed in *statu quo,* because it would be inequitable to place a heavy punishment on him where he acted in perfect good faith, as appears from the findings of the referee in this case.

The findings of fact under the rules of law hereinbefore announced show that petitioner is not entitled to judgment because they show that respondent under the peculiar circumstances of this case, cannot be placed *in statu quo.*

POINT V.

The court erred in not sustaining the demurrer to the complaint.

Defendant demurred to the complaint on the following grounds, among others: (1) that it did not state facts sufficient to constitute a cause of action; (2) that there is a defect of parties defendant because of the omission of August Mann and J. C. Walker, the other two syndicate managers; (3) that there is a defect of parties defendant because of the omission of the Sheffield Coal & Iron Company (fol. 169). The demurrer was overruled (fol. 177) and interlocutory judgment to that effect entered (fol. 180). The defendant assigned error to the action of the court in overruling the demurrer (fols. 2360, 2361, 2362, 2363).

We think this demurrer should have been sustained for the reasons which have been fully presented in the preceding points of this brief and which we shall not here repeat.

If the propositions of law heretofore laid down are correct, the complaint was demurrable because there was a defect of parties in that Walter and Mann, the other syndicate managers, were not made parties thereto and because the Sheffield Coal & Iron Company was not made a party thereto. The complaint was also demurrable because it failed to show that the agreement was capable of rescission; it failed to state that petitioner had in fact offered to place respondent *in statu quo;* and it failed to show that respondent could be placed *in statu quo.*

POINT VI.

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

MARTIN W. LITTLETON,
Counsel for Respondent,
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Supreme Court, U. S.
F I L E D
OCT 28 1916
JAMES D. MAHER,
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BRIEF FOR RESPONDENT.

Supreme Court of the United States.

OCTOBER TERM, 1916.

No. 2.

JAMES SIM,

Petitioner,

against

WILLIAM EDENBORN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Supreme Court of the United States,

OCTOBER TERM, 1916.

No. 8.

JAMES SIM,

Petitioner,

against

WILLIAM EDENBORN,

Respondent.

Statement of the Case.

This case comes here on a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit (Trans. p. 865) to review the judgment of the Circuit Court of Appeals entered on July 7, 1913 (Tr. p. 863), reversing the judgment of the United States District Court for the Eastern District of New York in favor of petitioner for the sum of $94,962.90 entered upon the report of a referee appointed under a stipulation waiving a trial by jury (Tr., fols. 338-342).

The action is at law to recover certain sums of money claimed to have been obtained from petitioner and his assignors by respondent's fraud in procuring their signatures to a syndicate agreement. It was commenced in the Supreme

Court of Kings County, State of New York, and afterwards removed to the United States Circuit Court for the Eastern District of New York on the ground of diverse citizenship.

The complaint alleges that from the 15th day of April, 1902, until the 1st day of January, 1903, defendant (respondent) was engaged in promoting, forming and carrying out a syndicate agreement to purchase, develop and dispose of certain lands and properties and for the purchase of the United States Iron Company of New Jersey, capitalized at $1,000,000, and its properties, and for this purpose prepared a syndicate agreement, appointing defendant and J. C. Walker and August Mann syndicate managers; (this agreement appears at folio 301 of the Transcript); that the defendant submitted same to the subscribers thereto and procured their subscriptions to the same; that under the syndicate agreement the defendant occupied a relation of trust and confidence to the subscribers and it was his duty to make to them a full disclosure of all the facts and circumstances within his knowledge necessary to enable the subscribers to form an independent judgment and to protect their interests; that plaintiff, one of the subscribers, had unlimited confidence in and relied on and trusted defendant to the fullest extent (fol. 14). It was further alleged in the complaint that, as an inducement to plaintiff to subscribe, defendant by the terms of the said syndicate agreement represented and stated to the subscribers that an opportunity was afforded to acquire for a cash consideration the ownership, control and possession of the United States Iron Company of New Jersey, capitalized at $1,000,000, and that at the time the defendant induced plaintiff to subscribe to said syndicate agreement defendant

owned 5365 out of a total of 9250 shares of the capital stock of said United States Iron Company then outstanding, and, intending to deceive and defraud plaintiff and other subscribers, concealed from them the fact that he owned a majority of the capital stock of the said company and controlled it (fols. 17-18); that the plaintiff paid to the syndicate managers the amount due on his subscription in installments between July 20, 1902, and December 20, 1902, and received certificates of stock of the par value of $100 each in the Sheffield Coal & Iron Company (fols. 22-23). It is further alleged in the complaint that after procuring the execution of the syndicate agreement by the subscribers, defendant caused the name of the United States Iron Company to be changed to that of the Sheffield Coal & Iron Company and the stock to be increased, and called upon the plaintiff for the payment of his subscription which plaintiff paid as aforesaid, and on or about January 1st, 1903, defendant delivered to plaintiff said certificates of stock in the Sheffield Coal & Iron Company (fols. 26-27); that the plaintiff, after the discovery of the fraud, deceit and fraudulent concealment practiced on him by defendant, notified the syndicate managers, including the defendant, that he elected to rescind his subscription to said agreement and offered to return the said certificates of stock to the defendant and demanded of defendant payment of the money which had been paid to defendant on the subscription agreement, which demand was refused; that plaintiff was ready and willing to deliver said certificates and receive back the money paid the defendant (fols. 27-28).

The second and third causes of action set out in the complaint are based on allegations of sub-

stantially the same fraudulent acts on the part of the defendant in inducing the subscribers Cluff and Coles to sign the same syndicate agreement. The fourth cause of action is based on substantially the same claims of fraudulent representations and concealment practiced by defendant on Elmer E. Stone, which caused said Stone to authorize a subscription of $5,000 to the syndicate agreement (fol. 350).

A demurrer to the complaint (fol. 75) was sustained on the ground that the complaint constituted an equitable action involving the rescission of the agreement with the other subscribers to the syndicate while apparently setting forth a demand for a tort, and on the further ground that the complaint did not state facts sufficient to constitute a cause of action and that there was a defect of parties because the other syndicate managers and the Sheffield Coal & Iron Company were not made parties (fol. 94). Thereupon plaintiff amended his complaint, but the only substantial change made is the addition of a paragraph stating that the stock of the Sheffield Coal & Iron Company was worthless (fol. 162) and an allegation that the sums paid in by plaintiff on the syndicate agreement were paid to *defendant* (fols. 113, 114). The defendant demurred to the amended complaint and the same Judge who passed on the first demurrer held that the complaint stated a cause of action at law based on a rescission of the contract and overruled the demurrer. A decision was entered which recited: (1) that the complaint stated facts sufficient to constitute a cause of action; (2) that there was no defect of parties defendant and (3) that the complaint stated a cause of action at common law, based on a rescission of a contract alleged to have been procured by fraud

(fol. 177). Interlocutory judgment was entered overruling the demurrer (fol. 69).

The defendant in his answer (fol. 85) denied the material allegations of the complaint, except that he admitted the execution of the syndicate agreement which was annexed to the answer as an exhibit (fol. 301).

The parties by stipulation referred the issues of law and of fact to Edward W. Hatch, referee, to hear and determine, and an order was accordingly entered (fols. 338-342). After a trial the referee made a report finding that defendant solicited plaintiff and his assignors to become subscribers to the syndicate agreement which authorized and contemplated the purchase of the stock of the United States Iron Company and other properties by the managers of the syndicate (fol. 347); that defendant did not disclose to them at or prior to the signing of said syndicate agreement his ownership of shares of stock in the United States Iron Company (fols. 348-349); that they signed the agreement in ignorance of defendant's interest in said corporation (fol. 350); that it was defendant's duty to make a full and complete disclosure of his interest in the United States Iron Company (fol. 351); that upon the discovery of his interest in said corporation the plaintiff and his assignors elected to rescind their subscriptions, and gave notice of such fact to the syndicate managers, and offered to return and restore the stock which each had received, and demanded the return of the money paid therefor (fol. 352); that defendant and the syndicate managers refused to accept the stock and return the money (fol. 353). The referee also found that at the time of the formation of the syndicate, the United States Iron Company was the owner of valuable iron properties in and about Sheffield, Alabama (fol. 2153); that defend-

ant made no statements to the plaintiff and his assignors with intent to deceive, defraud or mislead (fol. 2158); that defendant had not intentionally concealed his interest in the United States Iron Company or his ownership of stock from plaintiff and his assignors (fols. 2163, 2164, 2172, 2179, 2184, 2188, 2193); that no statement or action of the defendant was made for the purpose of leading the plaintiff or his assignors to believe that the defendant was not interested in said property or stock (fol. 2163). He further found that the plaintiff herein and each of his assignors knew that the defendant was largely interested in the formation of the syndicate and in the carrying out of its objects and purposes and was devoting considerable time thereto (fol. 2164). He further found that at a meeting of the stockholders of the Sheffield Coal & Iron Company held on June 9, 1903, the minutes of the annual meeting of the stockholders of the United States Iron Company held on June 10, 1902, were read and approved and that at this last named meeting the plaintiff Sim and his assignor Cluff were present in person and his assignors Coles and Stone were represented by proxy (fol. 2167); he further found that the minutes of the meeting of the stockholders of the United States Iron Company held on June 10, 1902, which were read and approved at said meeting of the stockholders of the Sheffield Coal & Iron Company held on June 9, 1903 showed the defendant's ownership of the stock of the United States Iron Company and the extent thereof (fol. 2169); he further found that at the time of the formation of said syndicate, the United States Iron Company was the owner of valuable iron ore property in and about Sheffield, Alabama (fol. 2153) and that the defendant believed that the operations of the

company which was to succeed the syndicate would be very profitable (fol. 2154); that at the time of the formation of the syndicate the defendant's interest in the United States Iron Company was known to a number of persons interested in the iron and steel industry and that the same had been the subject of publication on September 18, 1902 in the "Iron Age", the standard iron and steel trade paper (fol. 2162); that the plaintiff Sim had heard of the defendant's ore properties prior to the time of subscribing to the syndicate agreement (fol. 2175) and that he had heard of the proposed syndicate from Mr. Cluff before he had any conversation with defendant concerning it (fol. 2177) and that the defendant mentioned to the plaintiff Sim the name of the company the stock of which was to be acquired and where its properties were located (fol. 2177); that the defendant told plaintiff's assignor Mr. Cluff, in 1901, that he had bought out Mr. Gates' interest in the United States Iron Company (fol. 2191); that sometime in the year 1902 Mr. Coles learned that defendant had purchased Mr. Gates' interest in the property of the United States Iron Company (fol. 2196); the referee also found that the Sheffield Coal & Iron Company had become insolvent and that its stock had become practically worthless (fols. 2271-2272) notwithstanding that he found that it owned valuable ore properties in and around Sheffield, Alabama (fol. 2153).

The referee, following the opinion of the Court of Appeals in the case of Hecksher *v.* Edenborn (203 N. Y. 210), held that defendant's failure to disclose his interest in the United States Iron Company operated in law as a fraud on plaintiff and his assignors (fol. 355) and directed judgment in favor of plaintiff for the amount sued for with interest (fol. 358). Judgment was

entered denying defendant's motion for a new trial and in plaintiff's favor for the sum of $94,962.90 (fols. 400-402).

It is clear from an examination of the findings of fact and from the opinion of the referee that he did not believe and did not find that the defendant was guilty of any actual fraud, but based his conclusion that plaintiff was entitled to recover solely on constructive fraud on defendant's part in failing to disclose his interest in the United States Iron Company at the time the subscription agreement was signed. (See opinion of the referee Trans. fols. 374-376, 380, 381, 387).

On writ of error the Circuit Court of Appeals held that the facts found by the referee did not support the judgment entered (Trans., page 862); that defendant performed his duties as manager for and on behalf of the whole syndicate and not for and on behalf of any one subscriber; that he received the subscription of each subscriber on behalf of all and made the contemplated purchase and outlays on behalf of all, and that when the defendant sold his stock in the United States Iron Company to the reorganized Sheffield Coal & Iron Company, he sold it to that company as successor to the rights of all the subscribers to the syndicate; that if there was constructive fraud on Edenborn's part in not informing his subscribers of his personal interest in the stock of the United States Iron Company, the fraud was on the whole syndicate when the purchase was proposed and on the reorganized Sheffield Coal & Iron Company when the purchase was made; and that plaintiff could not restore the defendant to his original position by tendering him the stock plaintiff had received in the reorganized company, which stock represented a proportionate interest in other properties

greatly exceeding in value the amount of the defendant's interest in the original capital of the United States Iron Company (Transcript page 862); that if the syndicate subscribers had any right of rescission that right must be worked out through the purchasing company; that because of the peculiar situation of this case, no right of rescission existed in favor of the plaintiff (fol. 863). The plaintiff thereupon applied to this court for a writ of certiorari, which was granted.

We shall discuss the following questions involved on this certiorari:

(1) No principle of law was violated by respondent in procuring the execution of the syndicate agreement.

(2) No cause of action exists in petitioner's favor for money had and received, because the syndicate and not respondent received petitioner's money.

(3) The only agreement that can be rescinded is the agreement between the syndicate managers and Edenborn.

(4) Petitioner has not offered to place respondent *in statu quo* without which there can be no rescission. The findings of fact set out the syndicate agreement in full and show that it was carried out, but do not show that respondent can be placed *in statu quo*. In fact the findings show that respondent cannot be placed *in statu quo* and for this reason there is error of law in the judgment entered upon the facts found by the referee.

(5) The complaint is demurrable in that it fails to set out the syndicate agreement and fails to show that the circumstances were such that a rescission could be had and fails to show that respondent was placed *in statu quo*, or that petition-

er offered to place him *in statu quo,* and that he could be placed *in statu quo.* The complaint was demurrable because there was a defect of parties in that Walker and Mann, the other syndicate managers, were not made parties and in that the Sheffield Coal & Iron Company, which succeeded to the rights of the syndicate managers, was not made a party.

The suing out of the writ of error and assigning error on the action of the court in overruling respondent's demurrer to the complaint bring up for review the sufficiency of the complaint. In addition to this, the question as to whether the complaint states a cause of action is a question of law arising upon the face of the record and is one that is open for the consideration of this court without an exception and without an assignment of error.

The question as to whether or not the findings of fact made by the referee support the judgment entered is a question of law that arises on the f of the record and if the findings of fact do not support the judgment, this is an error of such controlling character that this court will notice it even without an assignment of error.

Chicago, Rock Island and Pacific R. R. Co. *v.* Barrett, 190 Fed. Rep. 118;
Seeberger *v.* Schlesinger, 152 U. S. 581;
Guaranty Trust Co. *v.* Koehler, 195 Fed. Rep. 669;
Paine *v.* Central Vermont R. R., 118 U. S. 152;
Roberts *v.* Benjamin, 124 U. S. 64;
Lupton *v.* Auto Club, 225 U. S. 489, 495;
Chicago, Milwaukee & St. Paul R. R. *v.* Clark, 178 U. S. 353.

BRIEF OF ARGUMENT.

POINT I.

No principle of law was violated by respondent in procuring the execution of the syndicate agreement by petitioner and his assignors.

The referee has found the execution of the syndicate agreement (fol. 347); that at the time of the execution of the agreement by plaintiff and his assignors they had no knowledge of defendant's ownership of shares of stock in the United States Iron Company (fol. 350); that it was defendant's duty at and prior to the signing of said agreement by the subscribers to make a full and complete disclosure of his interest in the United States Iron Company (fols. 350-351). This finding of fact is also stated as a conclusion of law (fol. 354). This is the only finding in this case on the subject of fraud. There is no finding that defendant knew that the plaintiff and his assignors were ignorant of defendant's ownership of the shares of stock in the United States Iron Company; on the contrary, the referee found that defendant's interest in the United States Iron Company at the time of the formation of the syndicate agreement was known to a number of persons interested in the iron and steel industry and had been the subject of publication on September 18th, 1902, in the "Iron Age," the standard iron and steel paper (fol. 2162). This publication appeared before plaintiff and his assignors had paid the whole amount of their subscriptions under the syndicate agreement (fol. 356). The referee found that the minutes of the meeting of the stockholders of the

United States Iron Company held on June 10th, 1902 (which was before any money was paid by plaintiff and his assignors on said subscription) showed defendant's ownership of stock of the United States Iron Company (fols. 2168-69). These minutes were read at the meeting of the stockholders of the Sheffield Coal & Iron Company held on June 9, 1903, and were approved at said meeting. At this meeting the plaintiff Sim and his assignor Cluff were present in person, and the assignors Coles and Stone were present by proxy (fol. 2168). The referee also found that plaintiff Sim had heard of defendant's ore properties prior to and at the time of his subscription to the syndicate agreement (fol. 2175); that the defendant told plaintiff's assignor Cluff in 1901 that defendant had bought out Gates' interest in the United States Iron Company (fol. 2191); that some time in the year 1902 plaintiff's assignor Cole learned that defendant had purchased Mr. Gates' interest in the property of the United States Iron Company (fol. 2197).

Defendant excepted to the 6th finding of fact to the effect that it was defendant's duty to make a complete disclosure to the syndicate subscribers prior to procuring their signatures to the agreement (fol. 2312), and excepted to the first conclusion of law which was to the same effect (fol. 2313); also excepted to the 1st, 2nd, 3rd and 4th conclusions of law (fol. 2313).

Defendant assigned as error the action of the referee in making said sixth finding of fact (fols. 2478-79) and also assigned as error the first conclusion of law made by the referee (fol 2483); the defendant also excepted to the third conclusion of law to the effect that plaintiff was entitled to recover moneys paid by plaintiff and his assignors

to the syndicate managers on said subscription agreement (fol. 2314), and assigned error thereon (fol. 2485); also assigned error to the action of the referee in directing judgment for plaintiff (fols. 2364-2365).

In the case of Hecksher *v.* Edenborn, 203 N. Y. 210, 219, Judge Hiscock, speaking for the Court of Appeals of the State of New York, in discussing the same agreement as involved in this action, said: "There is nothing to indicate that defendant acquired his stock in the United States Iron Company for any such purpose (that is, acquired it at a certain price for the purpose of sale to the corporation, and afterwards sold it to the corporation for a much higher price) or that the stock purchased by him and his associate managers in that company was not fairly worth the price paid for it, which was $30 per share less than the price fixed in the syndicate agreement. But broadly speaking, the complainants must rest their claim to relief on the basic principle that defendant induced them ignorantly to execute an agreement which violated the rule that an agent to buy may not purchase of himself."

At page 220, he said: "It (an action to recover based on a rescission) must stand as one directed against the syndicate agreement itself. If that was valid, plaintiff cannot succeed because under it and subsequently defendant did some illegal act in violation of it."

In the same case when before the Appellate Division, Second Judicial Department of the State of New York (131 A. D. 253), Justice Miller in discussing the same syndicate agreement said: "It may be conceded that the defendant was guilty of constructive fraud in purchasing for the syndicate the stock of the United States Iron Com-

pany, but the defendant's principal was the syndicate which was succeeded by the corporation, and the right of the syndicate or its successor, the corporation, to rescind the purchase of said stock does not give the syndicate subscribers the right to rescind their subscription contract. The contract of purchase of said stock, not the subscription contract, was rendered voidable by the defendant's constructive fraud."

At page 267, he said: "Here we have a case in which no fraud inducing the subscriptions is shown; but only a constructive fraud subsequent to the syndicate agreement upon the syndicate members generally to whose rights a corporation has succeeded. Obviously, in such a case the stockholders cannot in an action at law for damages compel the defendant to purchase their stock. Their action, if they have one, is a representative action."

The Circuit Court of Appeals concurred with the views expressed by Mr. Justice Miller (Transcript page 863).

We cannot persuade ourselves to the conclusion arrived at by the referee in this case based on the opinion of the Court of Appeals in the Hecksher case. We think the opinion expressed by Mr. Justice Miller in the Hecksher case and concurred in by the Circuit Court of Appeals in this case, expresses the correct view of the law applicable to the facts presented here.

It is well established that the rule of law announced in the Hecksher case is not binding on this court because a question of general jurisprudence is involved in which this court will exercise its own independent judgment (City of Chicago *v.* Robbins, 2 Black, 418; Burgess *v.* Seligman, 107 U. S. 20; Gardner *v.* Michigan Central R. R. Co., 150 U. S. 349, 358).

If A appoints B as A's agent to purchase ten shares of stock of the United States Steel Corporation, 10 shares of stock of the New York Central Railroad Company and 10 shares of stock of the Western Union Telegraph Company, the mere fact that B at the time the contract was made is the owner of ten shares of stock of the United States Steel Corporation does not make the contract by which B was appointed agent either void or voidable. The law was not violated until the stock owned by B was purchased by him as agent for A. Upon subsequently learning the fact, A could perhaps keep the stock and sue for damages, or even if he had suffered no damage might rescind the transaction, return the stock and recover the amount paid. The transaction upon which the law frowns is the sale by the agent to buy, of his own property, to his principal. So here the syndicate was formed to purchase the stock of the United States Iron Company in which (Edenborn owned an interest, and also *valuable coal and other properties* in which Edenborn had no interest (fol. 302). The syndicate agreement further provided that, "the parties hereto hereby form a syndicate to purchase, acquire, use, develop and dispose of the lands and properties above mentioned or *so much* or *such part* thereof as in the *judgment* and *opinion* of the *syndicate managers* is deemed advisable and proper" (fol. 306); it further provided, "should the syndicate managers in the exercise of their absolute power and discretion hereunder, sell, convey, or transfer any of the money or property acquired by the syndicate, for either cash, bonds, stock or securities, each of the subscribers hereto shall be entitled to receive on the termination of this agreement and the dissolution of this syndicate his *pro rata* share thereof." It further pro-

vided, "each and all the rights, liabilities, acts, undertakings, powers and authorities of the syndicate managers under this agreement and in pursuance thereof shall control and become operative and in force by the act of assent of any two thereof and each and all matters and things to be done or performed in and under this agreement, and in and by said syndicate, and in and by all depositaries, agents, trustees and all other persons, firms and corporations connected therewith, shall be done and performed and carried out on the request, judgment and direction of the said syndicate managers when done by the act or assent of any *two* thereof" (fol. 320).

When all subscriptions to the syndicate agreement had been procured, that contract became operative and the subscribers became bound each to the other for the amount of their respective subscriptions. If one of the syndicate managers was subsequently guilty of fraud in purchasing for the syndicate property in which he had an interest, that might, under certain circumstances, entitle the syndicate to rescind the purchase, but would not entitle any syndicate subscriber to rescind the syndicate agreement which had previously been made and had become binding upon him. The syndicate agreement could not be rescinded. Edenborn was not the agent of Sim and his assignors at the time they signed the syndicate agreement and became bound by its provisions. The agreement stated its purposes in language clear and explicit and the subscribers thereto were left free to determine whether or not they would execute it. When a subscriber signed the agreement he assumed certain contract obligations not only to the syndicate managers but to the other subscribers. His signature might influence others to subscribe. The subscriber, at the

time he subscribed, was representing himself on one hand and dealing with the syndicate managers on the other. The subscribers could have readily obtained all the information they desired about the ownership of the property if they only asked for it. It was just as much their duty to inquire as it was the duty of Edenborn to disclose without being asked. On the other hand, a fair inference from the findings heretofore set out is that Edenborn believed that the plaintiff and his assignors knew that he was interested in the stock of the United States Iron Company, and it is clear that this is the reason he did not speak affirmatively on this subject.

It appears from the syndicate agreement itself that it was discretionary with the syndicate managers whether they would buy Edenborn's interests in the United States Iron Company. The agreement provided that the syndicate managers should purchase the properties therein described or *so much* or *such part* thereof as in the judgment and opinion of said syndicate managers was deemed advisable and proper (fol. 306).

The Court of Appeals holds in the Hecksher case that the validity of the syndicate agreement must be determined as of the date of its execution, and that it cannot be declared invalid because after its execution the defendant did some illegal act in violation of the agreement. We contend that the Court of Appeals erred in holding that the syndicate agreement was fraudulent in its inception. Suppose the syndicate managers had not purchased the stock of the United States Iron Company, but had purchased stock or property in which Edenborn had no interest as they were authorized to do by the terms of the agreement, and that this purchase of such other property was afterwards fully carried out, could the plaintiff have

rescinded the syndicate agreement after such purchase simply because the syndicate managers had been empowered by the agreement to purchase Edenborn's property? Suppose Edenborn had in good faith after the execution of the syndicate agreement sold his stock in the United States Iron Company to a third party, and that Edenborn had thereafter become disabled to act as one of the syndicate managers and the other two managers had thereafter filled the vacancy caused by his disability, as was authorized by the syndicate agreement, and that such syndicate managers had subsequently purchased the shares of stock Edenborn had owned in the United States Iron Company from the person to whom Edenborn had sold it, could the plaintiff have thereafter rescinded the syndicate agreement because Edenborn had failed to disclose his interest in the United States Iron Company at the time he procured plaintiff's consent to that agreement? Suppose that after plaintiff had signed the syndicate agreement Edenborn had died and the two remaining members of the syndicate had selected another person as a syndicate manager to take the place of Edenborn, and that the syndicate had purchased the Edenborn stock from the executor or administrator of his estate, could plaintiff have rescinded the syndicate agreement because of Edenborn's failure to disclose his interest in the United States Iron Company at the time plaintiff signed the agreement? Suppose that *Mr. Walker,* one of the syndicate managers, had solicited plaintiff to subscribe to the syndicate agreement just as was done by Mr. Edenborn, then suppose the syndicate managers had in the exercise of their discretion under their agreement decided not to purchase Mr. Edenborn's stock in the United States Iron Company but had purchased other property not owned by

Edenborn, could the plaintiff rescind his subscription to the syndicate agreement simply because the agreement conferred on the syndicate managers power to purchase Edenborn's stock, and because Mr. Walker had not informed plaintiff of Edenborn's ownership of the stock of the United States Iron Company at the time plaintiff signed the syndicate agreement?

The fact that Edenborn was a member of a syndicate composed of three members, the other two not being controlled by Edenborn, and that the decision of any two of such members controlled with respect to the subject matter of the syndicate agreement, coupled with the fact that the syndicate agreement authorized the syndicate managers in their discretion to purchase certain property —a part of which was owned by Edenborn— from one of such syndicate managers, is not alone sufficient to justify the setting aside of the syndicate agreement on the ground of constructive fraud based on the fact that the syndicate manager who owned such property failed to disclose his ownership therein at the time one of the syndicate managers procured plaintiff to sign the syndicate agreement.

We think that there is no constructive fraud in the procuring of the execution of this syndicate agreement for the reason that it could be carried out without purchasing Edenborn's property. It could be executed without operating as a fraud on the subscribers. The presumption must be indulged that at the time of the execution of this agreement the syndicate managers intended to discharge their duties to the subscribers and intended to do everything required of them by law in carrying out the terms of said agreement. It cannot be assumed that at the time of the procuring of

the execution of the syndicate agreement the syndicate managers intended to commit a breach of trust. It must be assumed that they did not intend as syndicate managers to exercise their discretionary power to purchase Edenborn's property without informing the subscribers of such intention and having them sanction such purchase, if the law required such sanction.

Suppose the syndicate managers under this agreement which authorized them in their discretion to purchase Edenborn's property, had decided to purchase said property and had prior to said purchase referred their proposed action to the subscribers for approval, and that plaintiff then for the first time learned that Edenborn owned an interest in such property; suppose the subscribers had refused to sanction such purchase and the syndicate managers thereafter purchased other property in which Edenborn had no interest, could the plaintiff thereafter rescind his subscription to the syndicate agreement because of the failure of a syndicate manager to disclose Edenborn's ownership of the stock of the United States Iron Company.

Suppose the syndicate agreement had not conferred on the syndicate managers the discretionary power to purchase property, a part of which it afterwards develops was owned by Edenborn, but that the agreement had conferred general power upon the syndicate managers to purchase whatsoever property they desired for blast furnace purposes; suppose after an investigation by the snydicate managers they had come to the conclusion that the most desirable property for this purpose was owned by Edenborn, and suppose this conclusion had been arrived at independently of any act or influence of Edenborn; suppose the other two syndicate managers had in

good faith purchased from Edenborn said property at its reasonable market value, and suppose that in this sale to the other two syndicate managers Edenborn had acted for himself and not for the syndicate members, could plaintiff have rescinded the syndicate agreement because two of the syndicate managers had purchased Edenborn's property in the absence of proof of actual fraud, or unfair dealing, or undue advantage, on the part of Edenborn?

We think the law is well settled that "contracts and transactions between individuals and corporations of which they are directors or officers, which are fair, which are made in good faith, which do not secure to individuals any undue or unjust benefit or advantage, and in which the interest of the individuals and the duty of the officers work in unison for the welfare of the corporation, are valid and enforcible both at law and in equity". (Wyman *vs.* Bowman, 127 Fed. Rep. 257, 273).

Twin Lick Oil Co. *vs.* Marbury, 91 U. S. 587;
Hotel Co. *vs.* Wade, 97 U. S. 13;
Continental Insurance Co. *vs.* N. Y. & Harlem R. R. Co., 187 N. Y., 225, 238;
Burden *vs.* Burden, 159 N. Y., 287, 307, 308.

In purchasing the property of Edenborn under the terms of the general syndicate agreement above described which does not specifically authorize the purchase of Edenborn's property, such purchase, when made in good faith and for a fair consideration, if it can be set aside at all, can be done only at the instance either of the syndicate managers, or of a majority of the members of the syndicate. As we understand the law an individual stockholder of a corporation cannot

enjoin the execution of a contract between the board of directors of a corporation and one of the members of the board unless fraud, undue advantage or unfairness is shown. (Cowell *vs.* McMillan, 177 Fed. Rep. 25.) If the contract is not unfair to the corporation and is made in good faith, and secures to the director no undue or unjust benefit or advantage, an individual stockholder cannot complain unless he can establish fraud.

Burden *vs.* Burden, *supra;*
Continental Insurance Co. *vs.* N. Y. & Harlem R. R. Co., *supra.*

If it would be lawful for the other two syndicate managers to purchase Edenborn's property under the terms of a similar agreement to that involved here, but which did not mention Edenborn's property, and if such purchase could not be set aside by a syndicate member, in the absence of fraud, unfair dealing, or undue advantage on the part of Edenborn in making the sale, then on what theory can the syndicate agreement in this case be rescinded by plaintiff merely because it authorized the syndicate managers to make a purchase from one of the syndicate members, a purchase which could be lawfully made under proper safeguards without special authority for that purpose in the syndicate agreement?

The decision of the Court of Appeals that the syndicate agreement can be rescinded under such circumstances involves the assumption that the syndicate managers in carrying out the terms of the syndicate agreement would violate their duty to the subscribers, when the law presumes the contrary if the contrary can be done under the terms of the agreement. The syndicate agreement can be carried out without violating the law, without

any breach of trust by the syndicate managers even in the purchase of Edenborn's property as hereinbefore set forth. Therefore, this syndicate agreement cannot be rescinded on the ground that Edenborn was guilty of constructive fraud in procuring its execution by plaintiff. It is only a breach of duty under an agreement that can be set aside, not the agreement itself; hence, the rule laid down by the Court of Appeals in Hecksher *vs.* Edenborn, is manifestly wrong. The effect of the opinion in that case is that the agreement can be rescinded, not because the law must inevitably be violated, but because it is possible that there may be a breach of duty by the syndicate managers.

The right or discretion of the syndicate managers to purchase Edenborn's property does not constitute a violation of the rule that an agent to buy cannot buy of himself. If the syndicate managers had purchased Edenborn's property, and if in making such purchase Edenborn had acted as one of the syndicate managers, then it is obvious that the syndicate subscribers could have rescinded the transaction, or the corporation subsequently formed could have rescinded it, and any subscriber after calling upon the syndicate manager or the corporation to bring an action, and their refusal so to do, could maintain a representative action for this purpose. If, however, the syndicate managers had purchased Edenborn's property, and if in making such purchase Edenborn had not acted with or as one of the syndicate managers, but had acted only for himself in making the sale, and if such sale was made in good faith, and no unfair advantage was taken of the syndicate managers, such sale could be rescinded, if at all, only by action of a majority of the subscribers.

POINT II.

The findings do not support the judgment because they show that the moneys were paid by the plaintiff and his assignors to and received by the syndicate managers as such and were not paid to and received by the defendant.

The original complaint alleges that the moneys sued for were paid to the syndicate managers (fols. 22, 23). The amended complaint alleges that the moneys sued for were paid to and were received by the defendant (fols. 114, 125, 137, 155). The referee found at the request of the defendant as follows: "That all of the managers of said syndicate acted in carrying out the syndicate agreement and that the subscriptions of the plaintiffs and his assignors were paid to, and received by all of said managers as such" (fols. 2166-2167, 352-353). This finding is in effect a finding that the terms and provisions of the syndicate agreement in respect to the receipt and disbursement of moneys were carried out (fols. 307, 311, 320). On this finding of fact the referee based the conclusion of law that plaintiff was entitled to recover of the *defendant* the sums of money paid by plaintiff and his assignors to the *syndicate managers*. The defendant excepted to this conclusion of law (fol. 2414, 2485) and assigned error thereon (fol. 2485).

We contend that plaintiff was not entitled to recover anything in this action because the finding of the referee shows that the sums of money paid by the plaintiff and his assignors under the terms of the syndicate agreement were paid to the syndicate managers as such, and not to the defendant.

The findings do not show that defendant received any of this money. This money evidently went into the possession of the Sheffield Coal & Iron Company either in the shape of money or property, and not into the possession of the defendant (fols. 359, 2166).

When a party has been induced by fraud to enter into a contract he has two actions at law, the one based on a rescission, and the other for damages, but he cannot resort to both, for they are inconsistent; or, he may sue in equity for a rescission, in which event an accounting takes the place of damages. This is an action at law against the defendant for money had and received by the defendant based on an attempted prior rescission of the syndicate agreement for fraud. The plaintiff below elected to stand on his cause of action based on a rescission (fol. 1530); that is, he claimed that he had rescinded the contract on account of fraud and offered to return to the defendant the stock of the Sheffield Coal & Iron Company, and demanded of the defendant the return of the money which he alleged he had paid to him, but which the referee finds was received by the syndicate managers as such. By this act, the person defrauded assumes in law the ownership of the consideration with which he parted as the result of the fraud, and the law implies a promise on the part of the person to whom such money was paid to return it, because such person holds it without having paid any consideration therefor. The complaining party may then in an action for money had and received, recover from the party guilty of the fraud whatever he may have paid him.

It is well settled that an action to recover moneys paid upon a contract rescinded by one of the parties on the ground of fraud is based on the

promise to pay implied by law and is therefore an action for money had and received.

Freer *v.* Denton, 61 N. Y. 492, 495.
Byxbie *v.* White, 24 N. Y. 607.
Hecksher *v.* Edenborn, 131 A. D. 253.
Gould *v.* Cayuga Bank, 86 N. Y. 75.
Lambert *v.* Elmendorf, 101 A. D. 758.
Wilson *v.* U. S. Cattle Ranch Co., 73 Fed. 994.
Bridge *v.* Penniman, 9 Jones & Spencer, 183.

In Limited Investment Association *v.* Glendale Association, 99 Wisc. 54, 58, Judge Bardeen, speaking for the Supreme Court of Wisconsin, said, in discussing an action for money had and received: "The rule is quite elementary that to enable a person to maintain an action for money had and received it is necessary for him to establish that the persons sought to be charged have received money belonging to him, or to which he is entitled; that is an elementary fact on which the right of action depends (*National Trust Co.* v. *Gleason*, 77 N. Y. 400). The purpose of such an action is not to recover damages but to make the party disgorge, and the recovery must necessarily be limited by the party's *enrichment* from the alleged transaction. The evidence of crooked dealings or fraudulent practice is only important in determining the party's right to secure the funds. While it may be admitted that all the defendants are joint tort feasors to the extent that they would be jointly liable for all *damages* the plaintiff sustained by reason of their fraud, yet when it is sought to render them liable on a *quasi* contract a different rule prevails. The basis of recovery in the latter case being a loss on the one side and consequent enrichment on

the other, liability can only exist in so far as these elements concur. There is no implied promise to pay damages. The promise that the law implies is that the guilty party will restore that which he has received and which the other has shown himself entitled to. To the extent, therefore, which it is shown that one party has suffered loss and the other gained profit, can the recovery in this form be sustained. The law does not imply a promise to pay for something a party has not received, while in the case of a tort it casts upon him an obligation to pay all the damage done, regardless of a promise."

See also:

National Trust Co. *v.* Gleason, 77 N. Y. 400.

N. Y. Guarantee & Indemnity Co. *v.* Gleason, 78 N. Y. 503.

Phoenix Bridge Co. *v.* N. J. Iron Co., 30 A. D. 614.

Cyc, Vol. 27, page 860.

Of course, if the syndicate managers had acted with Edenborn in fraudulently obtaining plaintiff's money so that they would be joint tort feasors, and if the evidence showed that each wrongdoer was the agent for the other the receipt of the plaintiff's money by the syndicate managers would be a receipt of same by Edenborn. But there are no such facts in this case. There is no finding that any fraud, actual or constructive, was committed by the other two members of the syndicate who had the power and authority to control in every respect the action of the syndicate, or that they knew of and participated in the alleged fraudulent acts of Edenborn.

The undisputed evidence and the findings show that this money went through the syndicate, of

which Edenborn was a member, to the Sheffield Coal & Iron Company, and that this company had the whole beneficial interest in this money and in the property acquired by the syndicate with the syndicate funds. The fact is that Edenborn did not receive this money personally and there is no finding that he did receive it personally. All the plaintiff's money went to pay for property in which Edenborn had no interest and which was transferred to the Sheffield Coal & Iron Company. None of plaintiff's money was used to acquire Edenborn's stockholdings in the United States Iron Company. For his interest in the stock of the United States Iron Company amounting to $536,500, par value, he received $375,550. of the stock of the Sheffield Coal & Iron Company.

Let us concede for the moment that plaintiff is entitled to rescind the syndicate agreement because of Edenborn's failure to disclose his ownership of the stock of the United States Iron Company. Even with this concession is plaintiff entitled under the findings in this case to recover from the *defendant* the moneys paid to the syndicate managers? Suppose that shortly after signing the syndicate agreement and the payment of the money on his subscription to the syndicate managers, the plaintiff had learned of Edenborn's interest in the stock of the United States Iron Company and plaintiff thereupon undertook to rescind the subscription agreement, and desired to take the proper legal steps to recover the moneys paid by plaintiff to the syndicate managers in an action for money had and received, how would he proceed? The money is no doubt in the bank to the credit of Edenborn, Walker and Mann as syndicate managers. This money is held by the syndicate managers in trust as part of the common fund of all the syndicate sub-

scribers, and is to be used for the common enterprise in which all the subscribers are interested, and is to be held and devoted by the syndicate managers, as the representatives of all the subscribers, in carrying out that enterprise, and the common fund in this case was actually devoted to that purpose. There was never any contract that Edenborn should receive a dollar of plaintiff's money, and there is no finding that he did receive any of said money. In order to recover, it would be necessary for plaintiff to sue the syndicate managers and all the syndicate subscribers. Whatever the form of action, whether at law based on a rescission, or in equity for a rescission, we think that the syndicate subscribers would be necessary parties, as each syndicate subscriber has an interest in the common fund. The syndicate agreement provides that "the subscribers severally agree with each other and with the syndicate managers, as follows" (fol. 305).

Being an action at law for money had and received it would doubtless be necessary for the court to appoint a receiver of the common fund in the hands of the syndicate managers and perhaps grant a temporary injunction restraining the syndicate managers from disposing of the funds pending the action. At the termination of the litigation, if plaintiff was successful, plaintiff would be paid from the common fund in the hands of the receiver. Plaintiff would thus obtain his money from the party who had actually received it, that is, from the syndicate managers. The syndicate subscribers would be concluded by this litigation because they were parties thereto, and possession of the common fund would confer jurisdiction of the persons of all the subscribers, even if personal service could not be made on all the syndicate sub-

scribers. It is obvious that if an action in equity were brought for a rescission, the syndicate managers and the syndicate subscribers would all have to be made parties in the same manner as in an action at law.

The referee in holding Edenborn liable in an action for money had and received seems to have confused Edenborn with the syndicate managers, and this in the face of the fact that the funds were received by the syndicate managers as such. The fact that Edenborn was guilty of a constructive fraud, which caused plaintiff to pay money to a third party, the syndicate managers, is not sufficient to make Edenborn liable to plaintiff for said money in an action against Edenborn for money had and received. Edenborn might be liable to the plaintiff in an action for damages sustained by plaintiff as the result of defendant's alleged fraud, but not in an action for money had and received. The important fact in an action of this character is the receipt of the money by Edenborn.

If the judgment in this case would stand against Edenborn for money had and received it would also stand if it had been obtained by plaintiff against August Mann, who was also one of the syndicate managers, for the reason that Mann personally received this money just as much as Edenborn did. Suppose plaintiff had sued Mann instead of Edenborn and had alleged that plaintiff's signature to the syndicate agreement was procured by the fraud of Edenborn, just as is alleged here, and that as the result of said fraud plaintiff had paid over the amount due under his subscription agreement to the defendant Mann; and suppose the proof had disclosed, just as here, that the money was paid to the syndicate managers, would plaintiff be entitled to a judgment against Mann

for money had and received to plaintiff's use? Certainly not, because this would have been a personal judgment against Mann and would have required him to pay the judgment out of his own personal funds and not out of the moneys received from plaintiff.

POINT III.

The only agreement which could be rescinded is the agreement between the syndicate managers and Edenborn for the purchase of his stock in the United States Iron Company.

If there was anything unconscionable in the contract between the syndicate managers and Edenborn for the purchase of Edenborn's stock in the United States Iron Company, or perhaps even if it were a fair contract and no undue advantage taken of the syndicate, and it was not ratified and approved by the other syndicate subscribers, or by the Sheffield Coal & Iron Company, into which their interests were consolidated, that contract could, by appropriate action, have been rescinded. But even in that case that contract could only be rescinded by the parties to it, and upon restoring to Edenborn everything which he parted with, and such other parties, would then be entitled to recover back only what they actually paid to Edenborn. No one member of the syndicate would be entitled even in that case to avail himself of the right to rescind, for that purchase was made on behalf of the syndicate as a whole; and while some members of the syndicate might wish to rescind, the other members might not be entitled to do so,

or might not desire to do so, but might prefer to hold for the syndicate the property so purchased. Rescission could only be effected by a majority of the syndicate subscribers, if the transaction was fair and no undue advantage was taken of the syndicate by Edenborn. (Pollitz *v.* Wabash R. R. Co., 207 N. Y. 113, 127, 128.)

Even if the property was divisible or Edenborn's interests in the property were separable, it would of course not be possible for any one member of the syndicate to rescind *pro tanto,* because it would be impossible for him to restore *pro tanto.* If the syndicate as a whole, or the Sheffield Coal & Iron Company, into which their interests were consolidated, were entitled to rescind it would be impossible for them to do so at the present time because it would be impossible to restore the *status quo.* The only way in which that could be done would be for the new company to convey to Edenborn the *pro rata* share in the property formerly of the United States Iron Company, in proportion to his former interest in that company. If it were practicable for the Sheffield Coal & Iron Company, representing such syndicate subscribers, to make such restoration, all that it would be entitled to recover would be his stock of the Sheffield Coal & Iron Company which was delivered to Edenborn in payment therefor.

The syndicate agreement is one between all the subscribers to the syndicate to do those things which the syndicate agreement provides for doing. In addition to this, it is an agreement between all the subscribers and the managers of the syndicate who have been chosen to act for and on behalf of the entire syndicate, and who have been vested with certain powers and having enjoined on them certain duties under that agreement. We insist

that the attempt made at rescission in this case has not reached, and cannot reach, the only transaction which in our opinion is legally capable of rescission. The syndicate managers to whom is entrusted certain powers and duties, purchased Edenborn's interest in the stock of the United States Iron Company (Fol. 2259), though it is stated in the referee's first finding of fact that Edenborn owned this stock until he transferred it to the Sheffield Coal & Iron Company in December, 1902 (fols. 346, 2160); the syndicate managers also purchased the Mann property (fol. 2274); they also purchased coal property in Virginia and blast furnace property (fols. 302, 304, 351, 2167). After the subscription by plaintiff the name of the United States Iron Company was changed to that of the Sheffield Coal & Iron Company, and the capital stock increased from $1,000,000 to $2,500,000, and plaintiff received the exact amount of his subscription to the syndicate agreement in the stock of the Sheffield Coal & Iron Company at par (fol. 2268). This stock was evidently a part of the 25,000 shares of stock that the syndicate managers directed the Sheffield Coal & Iron Company to distribute among the subscribers to the syndicate agreement in amounts equal to the amount of their respective subscriptions (fol. 2270); the syndicate, acting through its managers, acquired the Edenborn stock in the United States Iron Company. It did not acquire this stock any more nor any less than it acquired the coal property or the blast furnace property. The only transaction which is capable of rescission, if the facts warrant it, is the contract by which Edenborn's individual stock in the United States Iron Company passed to the syndicate or to the Sheffield Coal & Iron Company through the agency of

the syndicate managers. Defendant's subscription to the syndicate agreement was for $500,000. and was subsequently reduced to $475,000. (fol.). At that time he owned 5,365 shares out of the total outstanding capital stock of the United States Iron Company of 9,250 shares, and in part payment of his subscription he transferred the said 5,365 shares of stock in the United States Iron Company to the syndicate at $70 per share (fol. 2259); in other words, it is conceded that the stock of the United States Iron Company was purchased for the sum of $467,000, and Edenborn's interest in said stock was purchased for $375,000 (fol. 2259). The total capitalization of the new company was $2,500,000. The purchase of the stock of the United States Iron Company owned by the Williams estate of 518 shares (fol. 2263), and by Elwood of 2201 shares (fol. 2257) is not condemned because of any trust relationship which they sustained towards the syndicate subscribers. It is not claimed that the purchase of the remainder of the property by the syndicate should be set aside because of anything done by Edenborn. The remainder of the money subscribed, about $2,000,000 went into equipment, blast furnaces, coal lands and other property.

The Court of Appeals said in the case of Hecksher *v.* Edenborn, 203 N. Y. 210, 215, "of the $2,500,000 subscribed, $647,500 in effect was expended for purchasing the entire capital stock of the United States Iron Company at $70 per share".

Edenborn's stock was included in this purchase. Continuing, the Court said:

"The balance of the aggregate subscriptions, with the exception of something over $900,000, which was reserved for future use, was expended

in purchasing other properties. As has already been indicated, respondent purported to pay his subscription of $500,000 to a large extent by turning in his holdings of the capital stock of the Iron Company at $70 per share" (p. 215).

So we have $2,124,450 of the total $2,500,000 of capital stock subscribed concededly going into property under the direction of syndicate managers or their successor, the corporation, about the purchase of which there can be no objection. An action in equity against William Edenborn alone for a rescission of the syndicate agreement could not be successfully maintained and we do not think that an action at law by a subscriber based on a rescission could be successfully maintained against Mr. Edenborn alone. The Court of Appeals further said (page 230):

"The agreement authorizing the purchase and organization of various properties was an entire one. The conclusion has been reached that so far as it authorizes the purchase of or related to defendant's property, it was constructively fraudulent, even though there was no actual fraudulent motive on his part."

To say that the syndicate agreement, when signed by a subscriber, was in any sense fraudulent because it authorized the purchase of Edenborn's property, in our opinion, misconceives or misunderstands the point. It was perfectly legitimate for the syndicate agreement to provide for the purchase of Edenborn's property as heretofore discussed. It was perfectly legitimate for him to procure signers to that agreement. This agreement at no time ever became subject to rescission for fraud. The fact is that the fraud occurred, if at all, not when the syndicate agreement was signed, but when the syndicate pur-

chased Edenborn's stock. It was this additional step that made the transaction constructively fraudulent. Therefore, we cannot assent to the statement in the opinion of the Court of Appeals—that the syndicate agreement was constructively fraudulent. Judge Hiscock further says: "I see no way by which the instrument can be subdivided." See what a far-reaching result this would be: $2,124,450 worth of other property, purchased by the syndicate, to which no objection can be made by any one, is claimed to be affected by Edenborn's act. Yet if this decision is followed, Edenborn is not only compelled to rescind the arrangement by which he and his associates got his property and turned it over to the syndicate, but he is compelled to return to the stockholders $2,124,450.00 worth of stock which had concededly no fraudulent connection with his failure to disclose his interest in the stock of the United States Iron Company. If this is correct, Edenborn is bound to take the stock of every individual in this corporation who comes before the Court and swears that he did not know that Edenborn was the owner of this stock. Plaintiff claims that defendant was his agent and that he could therefore rescind not the transaction by which the agent's property was purchased, but the very transaction in which he was appointed his agent. On the other hand, we assert that he never was the agent of plaintiff, certainly not until after the syndicate contract was made, and that even then the syndicate as a whole was the principal and that the syndicate managers were the agents of the syndicate only and not of each individual subscriber. The Sheffield Coal & Iron Company succeeded to all the rights of the syndicate and it is through that company, if at all, that the purchase of Edenborn's property may be rescinded.

Prior to the transfer of the property to the Sheffield Coal & Iron Company the rescission could have been effected by the syndicate as a whole if the facts justified it. Similar situations have frequently arisen, but usually in cases where a fraudulent profit was made in the transaction, and the books are full of cases where some individual undertook to obtain subscriptions to an agreement to buy property and turn it into a corporation, and where it subsequently developed that such person was interested in the property sold or had obtained some profit out of the transaction which he had failed to disclose. But no case can be found in which, as here, the subscriber has been allowed to rescind his subscription contract by tendering to the agent or promoter stock not received from him, and recover back the amount of the subscription which was not paid to him.

Edenborn does not question the general doctrine that where an agent has bought property for his principal without disclosing his interest in it, the principal may rescind the sale in a proper case. The difficulty with the present case is in confusing the parties to the transaction and the contracts, and misstating the remedy. The plaintiff claims that defendant was his agent and that he could, therefore rescind, not the transaction by which the agent's property was purchased, but the very transaction in which he was appointed an agent. On the other hand, defendant asserts that he never was the plaintiff's agent, certainly not until after the syndicate contract was made, and that even then the syndicate as a whole was the principal, and that the syndicate managers were the agents of the syndicate only and not of each individual subscriber. The Sheffield Coal & Iron Company succeeded to the rights of the syndicate, and it is through that company, if at all, that the pur-

chase of Edenborn's property may be rescinded. Prior to the transfer of the property to the Sheffield Coal & Iron Company a rescission could have been effected by the syndicate as a whole if the facts justified it. Similar situations have frequently arisen (though in all cases, with scarcely an exception, a fraudulent profit was made in the transaction), and the books are full of cases where some individual has undertaken to obtain subscriptions to a plan to purchase property and turn it into a corporation, and where it is subsequently developed that such person was interested in the property sold or had obtained some profit out of the transaction which he had failed to disclose. But no such case can be found in which, as here, a subscriber has been allowed to rescind his subscription contract by tendering to the agent or promoter stock not received from him, and to recover back the amount of his subscription which was not paid to the agent or promoter.

What then are the remedies which a subscriber to the stock of the corporation has under such circumstances?

(a) If the subscriber has been induced by fraud to subscribe, he may have an action in the nature of deceit against the one who has made the false representations.

(b) If the subscription to the stock was induced by a false representation of the agent of the corporation, he may bring an action against the corporation for the purpose of rescinding the subscription, or could, perhaps, surrender his stock to the corporation and demand back the money paid for it.

(*c*) If the agent has merely failed to disclose his interest in property sold to the syndicate or cor-

poration, or a secret profit made in connection with such sale, the action belongs to the corporation, which, under proper circumstances, may either rescind the sale, returning the property purchased and receiving back the money or stock paid therefor, or it may compel him to account for the profits obtained by such sale. In case the corporation does not undertake to sue for its own motion, a stockholder may bring suit, joining the corporation as a party defendant.

The cases on this point are numerous and embrace many English decisions of great importance.

New Sombrero Phosphate Co. *v.* Erlanger, L. R., 5 Ch. Div., 73.
Bagnall *v.* Carlton, L. R., 6 Ch. Div., 371.
Twycross *v.* Grant, 2 Com. Pleas Div., 503.
Whaley Bridge Calico Printing Co. *v.* Green and Smith, L. R., 5 Q. B. Div., 109.
Emma Silver Mining Co. *v.* Grant, 11 Ch. Div., 918.
Lydney *v.* Wigpool Iron Co. *v.* Bird, L. R., 33 Ch. Div., 85.

In this country there are also many cases:

Joplin Land Co. *v.* Case, 104 Mo., 572.
Cortes Co. *v.* Thannhauser, 45 Fed. 730.
Simons *v.* Vulcan Oil, &c., Co., 61 Pa. St., 202.
Pittsburg Mining Co. *v.* Spooner, 42 N. Y., 259 (Wis.).
Parker *v.* Michigan, 112 Mass., 195.
Yale Gas Stove Co. *v.* Wilcox, 64 Conn., 101.
Chandler *v.* Bacon, 30 Fed., 538.
Ex-Mission Land Co. *v.* Flash, 32 Pac., 600 (Cal.).
Burbank *v.* Dennis, 35 Pac., 444 (Cal.).
Colton Improvement Co. *v.* Richter, 26 Misc., 26.
Insurance Press *v.* Montauk Fire Co., 103 A. D., 472.
Brewster *v.* Hatch, 122 N. Y., 349.

In each of these cases the amount of damage is restricted carefully to the profits made by the promoter; or, if a rescission is permitted, only the sale of such property as has been actually transferred by the promoter to the corporation is abrogated and the amount paid for such property returned to the corporation There is never any attempt to mulct the promoter beyond what he actually received.

In several cases this is particularly apparent, such as Bagnall *v.* Carlton and Emma Silver Mining Co. *v.* Grant, *supra,* where the promoter's expenses in connection with the sale were allowed.

In these cases it is also clear that the corporation is the proper party plaintiff and that the shareholders' only right is through the corporation.

Morawetz on Corporations, Section 292, in commenting on the New Sombrero Phosphate Co. case, says:

> "The fraud really consisted in inducing the shareholders to enter into this contract in their collective capacity, and in using the funds belonging to the shareholders collectively in paying the purchase price. It is evident, therefore, that the injury to the shareholders was an injury to their collective or corporate interests, and that the company was the proper complainant."

In none of these cases is there any attempt made to, nor is there any authority to be found anywhere, for the contention that a shareholder could compel the promoter to take his stock off his hands, thus making the promoter the purchaser of practically all the outstanding stock of the corporation. We have already shown that such would be the result in this case if the present judgment were allowed to stand. If the plaintiff desires that the

sale of Edenborn's property to the syndicate should be rescinded he should have brought his action, joining the corporation as defendant in case the company refused to take such action itself. It may be that he was unwilling to pursue that course because of the fact that the property sold by Edenborn was of such value as to make it unwise to return it to him. If it were true that Edenborn had made any profit out of the transaction that could be recovered in the same manner. If Edenborn had induced the plaintiff to subscribe to the syndicate agreement by fraudulent representation, the plaintiff could recover his damages in an action for deceit.

Although, in view of the fact that by the syndicate agreement the subscribers expressly authorized the purchase of this specific property, it is doubtful if they would be entitled to recover in any form of action unless they could show actual fraud or secret profits obtained by the defendant.

Hutchinson *v.* Simpson, 92 App. Div., 398.
Blum *v.* Whitney, 185 N. Y., 240.

POINT IV.

Plaintiff and his assignors did not offer to and did not place defendant in statu quo.

The referee found the existence of a syndicate agreement (fol. 347); that the consolidation proposed in said agreement was carried out (fols. 351, 2160); that the subscriptions of the plaintiff and his assignors were paid to and received by all of the syndicate managers as such (fols. 2166, 2167); that the plaintiff and his assignors elected to rescind, notified the syndicate managers, and offered to restore and return the stock

which each had received and demanded the return of their money (fol. 352); that defendant's failure to disclose his ownership of the stock of the United States Iron Company operated in law as a fraud on plaintiff and his assignors (fol. 355); and that plaintiff was entitled to recover the sums paid him, with interest (fol. 356). The defendant excepted to these findings. (See exception No. 6, fol. 2312; exception No. 8, fol. 2313; exception No. 10, fol. 2314; and assigned error on this action of the court, fols. 2480, 2483, and 2485).

In the case of Grymes *v.* Sanders, 93 U. S. 55, the United States Supreme Court said:

> "A court of equity is always reluctant to "rescind unless the parties can be placed *in* "*statu quo*. If this cannot be done it will give "such relief only where the clear and strong- "est equity imperatively demands it."

The general doctrine of rescission has been clearly stated by the Court of Appeals in the case of Cobb *vs.* Hatfield, 46 N. Y. 537, where Judge Allen said:

> "The law not only requires a disaffirmance "of the contract at the earliest practical "moment after discovery of the cheat but a "return of all that has been received under "it and the restoration of the other party to "the condition in which he stood before the "contract was made."

In the case of Francis *vs.* N. Y. & B. L. R. R. Co., 108 N. Y., 97, Judge Finch said:

> "The theory of rescission is that the party "proceeded against shall be restored to his "original position."

And he further held under the facts of that case that the alleged rescission was ineffective because it was "very far from restoring the company to its original position."

In the case of Curtis *vs.* Howell, 39 N. Y. 215, the Court of Appeals said:

> "When the power to restore ceases, the "right to rescind ceases."

The case of Getty *vs.* Devlin, 54 N. Y., 403, is directly in point, although that was a case of gross actual fraud and was a suit in equity. In that case four persons, owning certain oil land which had cost them about $30,000, agreed to combine their interests, to organize a company and transfer their interests to the company at a large price above the cost and to divide the profits. To carry out this purpose they procured a subscription paper to be drawn up, by which the subscribers agreed to pay the sums subscribed for the purchase of property, specifying therein the lands above mentioned, at the sum of $125,000. Each of the four persons interested in the property subscribed $5,000 and caused certain others to sign as decoy subscribers for about half the amount subscribed. These subscriptions were not in fact paid, although so marked, and it was never intended that they should be paid. The plaintiffs, induced by the fraudulent assurances of one of the originators of the scheme that the land originally cost $125,000, and upon the belief that they became subscribers on a footing of equality with the others, subscribed and paid in their subscriptions. The moneys so paid were received and divided by the four associates. The company was thereupon organized, the property transferred to it, and stock taken in payment and divided *pro rata* among the subscribers, as well those who had not as those who had paid.

The court expressly held that the plaintiffs could not, on account of the fraud, recover back money paid by them, because they could not re-

store the four defendants to the position they were in before the transfer of the real estate, and that by returning the shares of stock which they held in the company which had taken title to the real estate, they did not put the four defendants in the position which they originally occupied, because what the defendants parted with was the real estate, and that had passed beyond their control. But, this being an action in equity, the court held that the defendants might be compelled to account for the profits they had made upon the real estate and which they had fraudulently appropriated to the exclusion of their associates. The court, after considering the gross fraud of the defendants and stating that the plaintiffs were entitled to relief in some form said, with peculiar pertinence to this case:

> "They could not, on account of the fraud, recover back all the money paid by them, because they could not restore the four defendants to the position they were in before the transfer of the real estate to the company. The real consideration for the money subscribed and paid was the real estate which was conveyed to the company at the request of the subscribers. The company took the title to the real estate, and then their interest in the company and through it in the real estate was represented by shares of stock. The plaintiffs did not place the four defendants in the position they were before the real estate was conveyed, by returning their stock, because what the defendants parted with was the real estate, and that had passed beyond their control. The plaintiffs caused it to be seized and sold for their debts against the company, after the discovery by them of the fraud of which they complain. It is a rule, quite uniform, that a party who seeks to recover back money which he had been induced to pay for property by fraud, must restore

the property before he can rescind the contract of purchase and recover the money paid. And he must act promptly upon the discovery of the fraud (Cobb *v.* Hatfield, 46 N. Y. 533; Masson *v.* Bovet, 1 Denio, 69; Moyer *v.* Shoemaker, 5 Barb., 319). It matters not, so far as I can discern, that it is difficult or even impossible for him to do so, so long as he is not prevented by the act of the wrongdoer. Before he can adopt this form of remedy he must do it, and the action in such case may be at law. All the defrauded buyer has to do is to tender back what he has received, and then he can commence his action at law to recover the money paid. In this case, if the tender of the release of the stock was sufficient, no resort to equity was necessary or proper, as each one of the plaintiffs could at once, after the tender, have sued in an action at law to recover the amount of money paid by him. A joint action by all the plaintiffs would not have been proper. Hence, this action cannot be maintained for the recovery of the entire amounts paid by the plaintiffs, upon the theory that they have restored to the four defendants all that they parted with for plaintiff's money."

Vail *vs.* Reynolds, 118 N. Y. 297.
Hammond *vs.* Pennock, 61 N. Y., 145.
Pullman *vs.* Alley, 53 N. Y., 637.
Gould *vs.* Cayuga Nat. Bk., 86 N. Y., 75.
Hogan *vs.* Weyer, 5 Hill, 389.
Bedell *vs.* Bedell, 3 Hun, 580.

The English cases on the question of rescission are uniform and in accord with the authorities cited in the United States.

In Re Cape Breton Co., 19 Ch. D., 77, the court held:

"In 1871 certain coal areas were purchased for £5,500 by six persons, of whom F. was

one, and were vested in G. as a trustee for them without disclosing the trust. In 1873 a company was formed for the purpose of purchasing these areas and other property. F. was one of the directors, and as such he concurred in effecting a purchase by the company from G. for £12,000 cash and £30,000 in fully paid-up shares, without disclosing the fact that F. was a part owner. In 1875 the company was ordered wound up. In 1878 a meeting of the contributories was called, at which two rival schemes were brought forward, one for repudiating the purchase of the coal areas, the other for adopting the purchase and selling the property. The latter scheme was adopted and was confirmed by the court. The liquidator accordingly sold the property, but at a heavy loss. A contributory then took out a summons under sect. 165 of the Companies Act, of 1862, to make F. liable for misfeasance as a director in allowing the company's seal to be affixed to the agreement for purchase by the company. Mr. Justice Pearsons dismissed the summons, holding that though the company would have been entitled to rescind the contract, yet as rescission had become impossible, no relief could be given against F.

Held, by Cotton and Fry, L. JJ., *dissentiente*, Bowen, L. J., that this decision was right.

* * * * * * * *

Cotton, L. J. "* * * It is material on that part of the case to consider what I have already mentioned—that the company was expressly formed for the purpose (among other things) of acquiring this particular property. The directors therefore were not acting under a general authority to buy property. If they had been, it might be said that when an agent does not buy, but hands over to his principal property of his own, he has not performed the commission entrusted to him. No authority has been quoted to show

that even in that case a director would be liable to an action by any shareholder for not having performed the duty which was entrusted to him by the company, and in my opinion such an action could not be maintained. There could be no action at law, and it cannot be considered that a contributory can acquire a right to bring in substance such an action by taking out a summons under sect. 165. Subject to what we might hear in arguments, for we have not heard the respondents on this point, and assuming that the whole circumstances were not in fact known to the board and to the company at the time of the purchase, the company, if so minded, might have set aside this purchase altogether. Where a trustee purchasing on behalf of his *cestui que trust,* purchases his own estate without disclosing his own interest in it, the *cestui que trust* when he discovers the fact, may, if he pleases, set aside the contract altogether, but then he must return that which has been purchased. The same rule applies in the case of a purchase by a director on behalf of a company, of property in which he has any interest; if the company repudiates the contract, the property must be returned. In this case a return of the property is impossible after what was done in 1878."

Bentinck vs. Fern, 12 App. Cas., 658:

Lord Herschell,

"Now there can be no doubt that inasmuch as Mr. Fenn was interested with his partner Mr. Crosthwaite to the extent of three-tenths of the value of these three coal areas, holding three-tenths of the shares in the Coal Area Association Limited, he was bound to disclose that interest to the other directors of the new company who were entering into a contract for the purchase of them, and his failure to make that disclosure would entitle the company, upon discovering his interest, to rescind the sale. I think about that there can

be no manner of doubt, but at the present time rescission has become impossible. * * *

"Again, there probably is little doubt that if an agent of a company is employed by that company to make a purchase for them in the market of goods of any description, and if instead of making that purchase in the market at the market price he sells to his company goods of the required description which he happens to own, at a price in excess of the market price, he can be made to pay to the company that excess, so as to leave their purchase, as it ought to have been, at the market price according to the obligations which he is under to them. But in the present case the purchase that was made was a purchase of specific property, it was that specific property alone which the agent, the director, was authorized to purchase; it was not left to him to purchase, at the best price at which they could be obtained, goods or land of a particular description, but his agency, so far as it existed at all, was an agency to purchase this specific property in which it is proved he had an interest.

"Now, I am by no means prepared to say that the argument of the appellant is well founded that such a case as this is a parallel case to the class of cases to which I have alluded, where an agent employed to go into the market and buy at the market price sells his own goods to the company at something above the market price. But I do not think it necessary to come to any absolute determination upon that point, because it is of the very essence of such a case as this to show that the price at which the property was sold to the company was in excess of what has been called the real price or the true value. Now what evidence is there here, upon which your Lordships would be entitled to act, that the property in question when purchased by the company was sold to them at a price in excess of the real value, or the market value

or the true value in which ever way you put it? I admit that there may be considerable ground for suspicion that the price was in excess of it. But obviously for such a case as the appellant seeks to make out here much more than that is necessary. It is of the very essence of the case, which rests upon his proving what he claims, namely, a secret profit improperly made, that he should prove that there has been that excess which he alleges. * * *"

Ladywell Min. Co. *vs.* Brookes, 35 Ch. D. 400:

"On the first of February, 1873, five persons (one of whom was a solicitor and conducted the negotiations) purchased a leasehold mine for £5,000 with a view of reselling it to a company to be formed; but they had at that time taken no steps to form any company. They completed their purchase on the 17th of March, 1873, the purchase money being paid out of their own moneys, and on the 4th of April they entered into a provisional contract with a trustee for an intended company for the sale of the mine to the company for £18,000. On the 8th of April, the company was registered under the Companies Act, its principal object being, as stated in the memorandum of association, the purchase of the mine, and in its articles the contract of the 4th of April, 1873, was adopted and confirmed, and four of the vendors were named as directors; but the contract of the first of February, 1873, was not disclosed to the company. The whole of the shares were placed by the vendors, and the share capital (£30,000) paid by them. At the same time they received £18,000 from the company as the purchase-money for the mine. In 1882 the company was wound up voluntarily, and in the course of the winding-up the facts relating to the purchase of the mine by the vendors became known to the company. In 1883 the company allowed judgment by default to

go against them in an action by the lessor to recover possession of the mine. In 1884 the company commenced two actions against the executors of three deceased vendors and the two surviving vendors to recover the secret profits made by the vendors on their sale to the company, on the ground that they stood in a fiduciary position to the company:

Held (affirming the decision of Stirling, J.), first, that the evidence did not prove that the vendors when they purchased the mines were promotors of, or in a fiduciary position towards the company which was ultimately formed; secondly, that assuming that the vendors committed a breach of duty in not informing the company after it was formed that the mine was their own property, and consequently that the company might have rescinded the contract, yet as rescission was now impossible, the company could not recover from them the profits which they had made. The action was accordingly dismissed."

In Re Lady Forest Gold Mine (1901), 1 Ch. 582:

"A syndicate, of which S. was a director and member, was formed in February, 1895, to acquire and work a mine, and in the same month issued a prospectus showing that the directors were aware that similar properties were often resold 'to the public' at a profit, and were 'not unmindful of the benefit that' might 'arise by converting the syndicate into a very much larger company within a short period.'

In October, 1895, the directors promoted and brought out a company, with a larger share capital than that of the syndicate, to purchase the mine on the terms of an agreement, already entered into in the same month with a trustee for the company, which provided for the payment of a purchase money much larger than what had been paid for and expended upon the mine by the syndicate.

The same persons were the directors of both the syndicate and the company. In the same month the company issued a prospectus offering some of its shares for public subscription and stating the names of its directors that they were directors of the syndicate selling to the company, and the date of, parties to, and consideration for the sale to the company. Inspection of the contract was also offered. The amount of profit on the resale to the company was not stated, and subject as aforesaid, there was nothing in the prospectus to show that the sale was at a profit.

The court found as a fact that when the syndicate acquired the mine it had no present intention of reselling to or forming another company, but contemplated working it in the first instance.

In the winding-up of the company it was sought to make S. liable on a misfeasance summons for the secret profit received by him as a promoter of the company.

Held, (1) that the syndicate and its directors were not promoters of the company when the syndicate acquired the property.

(2) That the disclosure in the prospectus of the company of the fact that the directors of the syndicate were directors of the company was a disclosure that some profit was being made.

(3) That S. and the other directors were guilty of a breach of duty in not disclosing what profit had been made on the resale to the company.

(4) That although the company might have had a right to rescind the contract S. could not be ordered to repay the profit which he had derived from the resale to the company.

Gluckstein *v.* Barnes, (1900) A. C. 240, distinguished.

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"There is the decision of the other two members of the Court of Appeals in Re Cape Breton Co., (1) which has been sometimes ex-

plained as proceeding upon peculiar facts; there is the case of Ladywell Mining Co. *vs.* Brookes (2) which has not been so explained; and there is the statement of Lord Cairns in Erlanger *vs.* New Sombrero Phosphate Co.—(3) all of which appear to me to go to this result: that although there is a breach of duty in such a case sufficient to entitle the vendee company to rescind or repudiate the contract if matters have not been too much altered in the meantime, nevertheless there is sufficient ground for requiring a person in the position of Mr. Simpson to repay the profit or the benefit that he has received out of the sale. It is quite true, I think, that the cases on which so much reliance has been placed on Mr. Simpson's behalf have been to some extent doubted, perhaps even questioned, in later cases, and certainly some of them have been cited and discussed and have not been been cited and disucssed and have not been expressly dissented from, still less overruled, in any case to which I have been referred."

The stock which the plaintiff and his assignors offered to deliver to the defendant never was the property of the defendant and he never had any interest of any kind therein. The defendant Edenborn never owned plaintiff's subscription to the syndicate agreement, yet plaintiff and his assignors have obtained a judgment which in effect compels Edenborn to purchase or take off plaintiff's hands the shares of stock which they purchased in the Sheffield Coal & Iron Company. Whatever the plaintiff and his assignors may do in this case may be done by all the subscribers to the syndicate agreement who can show that they did not know of Edenborn's interest in the stock of the United States Iron Company at the time they subscribed. If this judgment can be sustained then Edenborn can be

compelled to accept and pay for the stock of all the other subscribers amounting to two million dollars. He can be made to accept the ownership of stock for which he never contracted and which he never at any time owned and in which he never at any time had any interest. Before the syndicate agreement he owned 5,365 shares of the stock of the United States Iron Company which was turned in to the Sheffield Coal & Iron Company for $375,550. After a rescission by all the subscribers, in the event they should decide to rescind, as has been done by plaintiff below in this case, Edenborn would own all of the stock of the Sheffield Coal & Iron Company. This same result would be reached although his interest in the United States Iron Company amounted to only one thousand dollars; that is if his interest in the stock of the United States Iron Company had amounted to only $1,000.00 the other subscribers could under the rule of law announced in the Hecksher case compel the defendant to take over their subscriptions amounting to $2,449,000. The parties could not be placed *in statu quo* by rescinding the subscription contract between defendant and plaintiff because it is now converted into shares of the Sheffield Coal & Iron Company and that company is the only party liable in an action for rescission, if one can now be sustained.

When the subject matter of a contract has been so dealt with that the court cannot place the parties in their original state there can be no rescission but the parties must be left to an action for damages.

Furness *v.* Grove, 12 How. 51.
Murray *v.* Watson, 8 Cow. 238.
Curtis *v.* Howell, 39 N. Y. 211.
Padden *v.* Taylor, 44 N. Y. 371.

The court instead of restoring to defendant Edenborn the $375,550 worth of property which he put into the enterprise, and, as the law requires, putting him *in statu quo*, would compel defendant Edenborn to enter into a new contract by which he is to become the subscriber to two million dollars of stock, in addition to the $375,550 worth of property which he put into the enterprise and the additional stock for which he paid in cash. Instead of putting him *in statu quo*, the court would in this manner make him the sole owner, with one or two exceptions, of all the stock of the Sheffield Coal & Iron Company, and this notwithstanding the fact that all of the property which was purchased by the syndicate outside of the stock of Edenborn in the United States Iron Company was property in which Edenborn had no interest whatever.

The remedy of rescission is an equitable remedy resorted to for the purpose of doing equity, and not for the purpose of perpetrating a wrong and hardship. The referee has found that the syndicate agreement was entered into in good faith on the part of defendant, (fol. 2154); that no statements were made by defendant with the intent to deceive, defraud or mislead plaintiff or his assignors (fols. 2158, 2172, 2179, 2184, 2188, 2193); that the defendant did not intentionally conceal his interest in the United States Iron Company from the plaintiff and his assignors (fols. 2163, 2164).

We submit that it was Edenborn's duty as well as that of the syndicate managers who represented plaintiff and his assignors to carry out the syndicate agreement. It was entered into in good faith by Edenborn, without any intent to conceal his interest in the stock of the United States Iron Company; it is evident from the findings that

Edenborn believed that plaintiff and his assignors knew all about his interest in the United States Iron Company; the provisions of the agreement were carried out in good faith by Edenborn and every member of the syndicate at a time when the agreement was in full force and effect. It is submitted that plaintiff's attempted rescission cannot operate so as to invalidate, as between plaintiff and defendant, what was done under that agreement. The plaintiff was represented by the other syndicate managers, who had no interest in the United States Iron Company and who could control the action of the syndicate with respect to the propriety of the purchase of Edenborn's stock.

We contend that the rule announced by the Court of Appeals that defendant cannot set up the syndicate agreement to justify acts done under it and to prevent a rescission after plaintiff has taken advantage of the right to rescind, is manifestly erroneous under the facts in this case. This might be the proper rule in some cases but should not apply to a case where there was no attempt to deceive or conceal; where the fraud, if any, resulted only by operation of law. We think rescission cannot be accomplished here because defendant cannot be placed *in statu quo,* because it would be inequitable to place a heavy punishment on him where he acted in perfect good faith, as appears from the findings of the referee in this case.

The findings of fact under the rules of law hereinbefore announced show that petitioner is not entitled to judgment because they show that respondent under the peculiar circumstances of this case, cannot be placed *in statu quo.*

POINT V.

The court erred in not sustaining the demurrer to the complaint.

Defendant demurred to the complaint on the following grounds, among others: (1) that it did not state facts sufficient to constitute a cause of action; (2) that there is a defect of parties defendant because of the omission of August Mann and J. C. Walker, the other two syndicate managers; (3) that there is a defect of parties defendant because of the omission of the Sheffield Coal & Iron Company (fol. 169). The demurrer was overruled (fol. 177) and interlocutory judgment to that effect entered (fol. 180). The defendant assigned error to the action of the court in overruling the demurrer (fols. 2360, 2361, 2362, 2363).

We think this demurrer should have been sustained for the reasons which have been fully presented in the preceding points of this brief and which we shall not here repeat.

If the propositions of law heretofore laid down are correct, the complaint was demurrable because there was a defect of parties in that Walker and Mann, the other syndicate managers, were not made parties thereto and because the Sheffield Coal & Iron Company was not made a party thereto. The complaint was also demurrable because it failed to show that the agreement was capable of rescission; it failed to state that petitioner had in fact offered to place respondent *in statu quo;* and it failed to show that respondent could be placed *in statu quo.*

POINT VI.

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

MARTIN W. LITTLETON,
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JOSEPH W. BAILEY,
OWEN N. BROWN,
Of Counsel.

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Supreme Court of the United States,

OCTOBER TERM, 1914.

No. 262. [redacted] 9

THOMAS P. ALDER,

Petitioner,

versus

WILLIAM EDENBORN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT.

MARTIN W. LITTLETON,
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Supreme Court of the United States,

OCTOBER TERM, 1914,

No. 262.

THOMAS P. ALDER,
Petitioner,

AGAINST

WILLIAM EDENBORN,
Respondent.

Brief for Respondent.

Statement of the Case.

This case comes here on a writ of *certiorari* to the United States Circuit Court of Appeals for the second circuit, granted September 27, 1913 (Tr. page 181), to review the judgment of the Circuit Court of Appeals entered on July 7th, 1913 (Tr., p. 179) reversing a judgment of the United States District Court for the Eastern District of New York in favor of the plaintiff for the sum of $16,739.01 entered upon the report of a referee appointed under a stipulation waiving a trial by jury (Tr., fols. 224-227).

The action is at law to recover certain sums of money claimed to have been obtained from peti-

tioner (plaintiff below) by defendant's fraud in inducing plaintiff to take a $10,000 interest in a syndicate agreement; it was commenced in the Supreme Court of Kings County, State of New York, and afterwards removed to the United States Circuit Court, Eastern District of New York, on the ground of diverse citizensip (Tr., fol. 36). The complaint alleges that from the 15th day of April, 1902, until the first day of January, 1903, defendant was engaged in promoting, forming and carrying out a syndicate agreement to purchase, develop and dispose of certain lands and properties and for the purchase of the United States Iron Company of New Jersey, capitalized at $1,000,000, and its properties, and for this purpose prepared a syndicate agreement, appointing defendant and J. C. Walker and August Mann, syndicate managers (this syndicate agreement is set out at folio 127 of the transcript); that the defendant solicited plaintiff to become a subscriber to said syndicate agreement (fol. 15); that as an inducement to subscribe, it was represented and stated in said agreement that an opportunity was afforded to acquire for a cash consideration, the ownership, control and possession of the United States Iron Company of New Jersey, capitalized at $1,000,000, at par (fol. 17); that plaintiff, relying upon the truth of the statements made by defendant consented to become a subscriber to said syndicate agreement in the sum of $10,000 (fol. 22) and on or about the 17th day of December, 1902, paid defendant the sum of $10,136.08, being the amount of said subscription and the interest thereon (fols. 22-23). The complaint further alleged that at the time defendant procured plaintiff's consent to become a subscriber, the defendant was the owner of 5,365 out of a total of 9,250 shares of the stock in the United States Iron

Company (fol. 17) and fraudulently and wrongfully concealed from plaintiff the fact that he owned a majority of the capital stock of said United States Iron Company and controlled it (fol. 18); the complaint further alleged that under the syndicate agreement defendant occupied a relation of trust and confidence to the subscribers and it was his duty to make to them a full disclosure of all the facts and circumstances within his knowledge necessary to enable the subscribers to form an independent judgment and protect their interests; that plaintiff had unlimited confidence in and relied on and trusted the defendant to the fullest extent (fol. 14); that after the payment of the amount of his subscription defendant received a certificate for 100 shares of stock in the Sheffield Coal and Iron Company in the name of Caroline E. Alder and was notified by the defendant that he had been made a subscriber to said syndicate agreement (fol. 23) that the plaintiff after discovery of the fraud, deceit and fraudulent concealment practiced on him by defendant, notified the syndicate managers, including the defendant, that he elected to rescind his subscription to said agreement and offered to return the said certificates of stock to the defendant and demanded of the defendant the payment of the money which had been paid to the defendant on the subscription agreement which demand was refused; that plaintiff was ready and willing to deliver said certificates and to receive back the money paid the defendant (fols. 29-30).

A demurrer to the complaint (fol. 39) was sustained on the ground (1) that it did not state facts sufficient to constitute a cause of action (2) that there was a defect of parties in that the co-syndicate managers were not made defendants (3) that the corporation whose stock was transferred was

not made a party defendant (4) that the complaint included in one cause of action the allegations of an action in equity to rescind the contract and the allegations of an action at law to recover damages for fraud and deceit (fol. 45). Thereupon plaintiff amended his complaint but the only substantial change made was the addition of a paragraph stating that the stock of the Sheffield Coal and Iron Company was worthless (fols. 72-73). The defendant demurred to the amended complaint and the same judge who passed on the first demurrer held that the complaint stated a cause of action at law based on a rescission of the contract and overruled the demurrer. An order overruling the demurrer was entered which provided (1) that the complaint stated facts sufficient to constitute a cause of action (2) that there was no defect of parties defendant (3) that the complaint stated a cause of action based on the rescission of a contract alleged to have been procured by fraud (fol. 81). Interlocutory judgment was entered overruling the demurrer (fol. 86). The defendant in his answer (fol. 89) denied the material allegations of the amended complaint except that defendant admitted the execution of the syndicate agreement which was annexed to the answer as an exhibit (fol. 127). The parties by stipulation referred the issues of law and fact to Edward W. Hatch, Referee to hear and determine and an order was accordingly entered (fols. 166-171).

After the trial the referee made a report finding that in 1902 the defendant in connection with others, conceived a scheme to consolidate the United States Iron Company and other iron ore properties, erect blast furnaces for smelting iron ore and manufacture pig iron and for this purpose prepared the syndicate agreement which is set out at folio 127 of the transcript (fol. 176); that be-

fore the syndicate agreement had been fully underwritten or subscribed, the defendant and plaintiff had a conversation about the plaintiff making a subscription thereto; that at that time, plaintiff was short of funds and was unable to furnish the money to pay for the stock, so he did not then subscribe to the said syndicate agreement; that after the subscription for all the stock had been made, plaintiff and defendant again met and plaintiff requested the defendant to procure him some of the subscribed stock which the defendant undertook to do; that the defendant subsequently procured from Mr. Ellwood, a syndicate subscriber, a part of his subscription and thereafter procured the stock and delivered the 100 shares thereof to the plaintiff for which he paid the subscription price of $10,000 to which was added the sum of $138.08 interest to place the plaintiff upon the same footing as to cost with those who had actually subscribed to the syndicate agreement (fols. 177-178); that defendant, did not at any time disclose to the plaintiff his ownership in the stock of the United States Iron Company or that he had any pecuniary interest therein and that plaintiff was not informed of defendant's interest in the United States Iron Company at or prior to the purchasing said stock and did not acquire such information until a considerable time thereafter (fol. 180); that it became and was the duty of the defendant at or prior to the procuring of part of Ellwood's subscription and prior to making the sale of said stock to the plaintiff to make full and complete disclosure of his interest in the United States Iron Company (fol. 181); that after the proposed consolidation provided for in the syndicate agreement had been made, plaintiff learned of the defendant's interest in the United States Iron Company (fol. 182). He then

elected to rescind his purchase of such stock and gave notice of such fact to the syndicate managers and offered at that time to restore and return the stock which he had received and demanded the return of the money which he had paid therefor (fol. 182); that the defendant and the syndicate managers each refused to accept the return of said stock and refused to refund the plaintiff his money (fol. 183); that the plaintiff has not been guilty of laches in asserting his claim (fol. 183). The referee found as a conclusion of law that it was the duty of defendant at or prior to procuring a part of Ellwood's subscription and prior to making the sale of said stock to plaintiff to make a full and complete disclosure to plaintiff of defendant's interest in the United States Iron Company (fol. 184) and that defendant's failure to make such disclosure operated in law as a fraud upon plaintiff (fol. 185); that the plaintiff was entitled to recover from the defendant the sum of $10,138.08 with interest aggregating $15,942.08. The referee also found that at the time of the formation of the syndicate, the United States Iron Company was the owner of valuable iron properties in and about Sheffield, Alabama (fol. 236); that defendant made no statements to the plaintiff with intent to deceive, defraud or mislead (fol. 241) that defendant had not intentionally concealed from plaintiff his interest in the United States Iron Company or his ownership of stock therein (fols. 246, 247, 255); that plaintiff did not sign the syndicate agreement (fol. 253); that plaintiff, prior to the transaction in question, had heard of the United States Iron Company (256); that at the time of the formation of said syndicate the defendant believed that the operations of the company which was to succeed the syndicate would be profitable (fol. 237); that the defendant subscribed to said syndicate the

sum of $500,000 which was subsequently reduced to $475,000 (fol. 242) that defendant exchanged the stock of the United States Iron Company theretofore held by him for new stock of the same company with its name changed and on the exchange the old stock was figured at a valuation of $70 per share and the difference between this amount and the amount of his subscription, the defendant paid in cash (fol. 243); that the defendant's interest in the United States Iron Company at the time of the formation of the syndicate was known to a number of persons interested in the Iron and Steel industry and that the same has been the subject of publication in the "Iron Age" the standard iron and steel trade paper of September 18, 1902 (fol. 246); that the plaintiff knew that the defendant was largely interested in the formation of the syndicate and in carrying out its objects and purposes (fol. 247); that all of the managers of the syndicate acted in carrying out the syndicate agreement and that the subscription of the plaintiff was paid to and received by all of said managers as such (fol. 450); that at a meeting of the stockholders of the Sheffield Coal and Iron Company held on June 9, 1903 at which the plaintiff was represented by proxy, the minutes of the last annual meeting of the stockholders of the United States Iron Company held on June 10, 1902 were read and approved (fols. 250-251); that the minutes of the meeting of the United States Iron Company held June 10, 1912 which were read at the meeting of the stockholders of the Sheffield Coal and Iron Company on June 9, 1903, showed defendant's ownership of the stock of the United States Iron Company (fol. 252) that in part payment of the defendant's subscription he transferred his 5365 shares of stock in the United States

Iron Company to the syndicate at $70 per share (fol. 294) that after the subscription by plaintiff the name of the United States Iron Company was changed to that of the Sheffield Coal and Iron Company and the stock of the Sheffield Coal and Iron Company increased from $1,000,000 to $2,500,000; that the defendant delivered to the plaintiff in return for the money which he had paid to him, stock of the Sheffield Coal and Iron Company at par for the exact amount of his subscription (fols. 303, 304), that on the 30th day of December, 1902, the syndicate managers directed the Sheffield Coal and Iron Company to distribute 25,000 shares of the Sheffield Coal and Iron Company's stock among the subscribers to the syndicate agreement in amount equal to the amount of their respective subscriptions (fols. 305-306) that the stock of the Sheffield Coal & Iron Company had become practically worthless (fol. 307).

The referee, following the opinion of the Court of Appeals in the case of Hecksher *v.* Edenborn, 203 N. Y. 210 held that the defendant's failure to disclose his interest in the United States Iron Company operated in law as a fraud on plaintiff and directed judgment in favor of the plaintiff for the amount sued for with interest.

It is clear from an examination of the findings of fact and from the opinion of the Court of Appeals that the court did not believe and did not find that the defendant was guilty of any actual fraud, but based his finding entirely on constructive fraud on the defendant's part in failing to disclose his interest in the United States Iron Co. at the time the plaintiff purchased an interest in said subscription agreement (see opinion of the Referee, fols. 200-202, 206, 207, 213). Judgment was entered denying defendant's motion for a new

trial (fol. 372) and in plaintiff's favor for the sum of $16,739.01 (fols. 224-227).

On writ of error the Circuit Court of Appeals held that the facts found by the referee did not support the judgment entered (Tr. p. 178); that defendant performed his duties as manager for and on behalf of the whole syndicate and not for and on behalf of any one subscriber; that he received the subscription of each subscriber on behalf of all and made the contemplated purchases and outlays on behalf of all and that when the defendant sold his stock in the United States Iron Company to the reorganized Sheffield Coal and Iron Company he sold it to that company as successor to the rights of all the subscribers to the syndicate; that if there was a constructive fraud on Edenborn's part in not informing his subscribers of his personal interest in the stock of the United States Iron Company the fraud was on the whole syndicate when the syndicate was proposed and on the reorganized Sheffield Coal and Iron Company when the purchase was made; that plaintiff could not restore the defendant to his original position by tendering him the stock, plaintiff had received in the reorganized company which stock represented a proportionate interest in other properties greatly exceeding in value the amount of the defendant's interest in the original capital of the United States Iron Company (Tr. pgs. 178, 179); that if the syndicate subscribers had any right of rescission that right must be worked out through the purchasing company; that because of the peculiar situation of this case no right of rescission existed in favor of the plaintiff (fols. 178, 179). Plaintiff thereupon applied to this court for a writ of certiorari which was granted.

Brief of the Argument.

FIRST: This case does not differ very materially from that of Sim against this respondent and presents the same questions. Respondent submits to the court herewith his brief of the argument in the case of Sim *v.* Edenborn.

SECOND: The judgment of the Circuit Court of Appeals should be affirmed.

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SIM *v.* EDENBORN.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 8. Argued May 5, 1915; restored to docket for reargument April 3, 1916; reargued October 23, 1916.—Decided December 4, 1916.

Respondent induced petitioner and others to join with him as subscribers to a syndicate agreement, under which the stock of a corporation was acquired, other property purchased and added to its capital, its stock increased and the shares distributed to the subscribers in proportion to their subscriptions. By this agreement respondent was constituted an agent for the other subscribers with large powers, and became their fiduciary in respect of the acquisition

and management of the subject-matter. By misleading representations and suppression he concealed the fact that the original shares were largely his when the agreement was made, and, carrying out a purpose entertained from the beginning, surreptitiously made use of those he owned in squaring off his subscription. Subsequently, petitioner and other subscribers, discovering this deception and fraud, promptly elected to rescind, gave due notice, offered to return all stock by them received, and demanded back their money.

Held, that tender of the stock actually received, being all the subscribers could do toward restoring the original position, was an adequate preliminary to an action at law against the respondent to recover the amounts paid on their subscriptions. *Heckscher* v. *Edenborn*, 203 N. Y. 210, approved.

Although on a question of commercial law or general jurisprudence the federal courts exercise their own judgment, they nevertheless lean toward agreement with the state courts where the question is balanced with doubt.

206 Fed. Rep. 275, reversed.

THE case is stated in the opinion.

Mr. Theron G. Strong for petitioner.

Mr. Joseph W. Bailey, with whom *Mr. Martin W. Littleton* and *Mr. Owen N. Brown* were on the briefs, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

By an action at law commenced in the Supreme Court, Kings County, New York, and subsequently removed to the United States Circuit Court because of diverse citizenship, petitioner, Sim, sought to recover from respondent the amounts paid upon subscriptions to a syndicate agreement which the latter fraudulently induced him and his assignors to make. By stipulation, a jury being waived, the issues were referred to a referee. The reported facts, essential to an understanding of points now involved, are summarized below.

While owning the majority stock of United States Iron Company, respondent and others conceived a scheme to consolidate it with certain coal properties, erect blast furnaces, engage in smelting and manufacturing iron, etc. He accordingly prepared an agreement, dated April 15, 1902, stating generally the ends in view, and invited subscriptions. This instrument designated him and two others as "Syndicate Managers," and recited there was an opportunity to acquire for cash the $1,000,000 capital stock of that company, together with valuable coal properties, and that the purpose was to raise the essential two and a half million dollars. It further specified that "The Syndicate Managers hereunder shall have the direction and management of the subject-matter of the said Syndicate, and each subscriber nominates and appoints the Syndicate Managers his agents and attorneys irrevocable, until the termination of this agreement to exercise all the rights of the subscribers in and to the properties proposed to be acquired." Still other provisions conferred upon the managers wide discretion and powers of control. Petitioner and his assignors became subscribers while in entire ignorance of respondent's true position. He represented that it was proposed to purchase only valuable and paying properties; that subscriptions were payable in dollars, and not in property; that he had made a subscription for $500,000 payable in dollars; that the enterprise was being organized in good faith; that all, according to their interest, had equal rights and stood on same basis; that every man's dollar was put up against every other man's dollar; and that there were to be no special advantages to any one. In fact, however, he always intended to utilize stock owned by him in payment of his subscription. The managers changed the company's name to Sheffield Coal & Iron Company, increased the capital to $2,500,000, and caused it to acquire additional coal properties. For cash paid to them

by syndicate members, they delivered an equal amount of stock issued by the corporation. In settlement of his subscription (reduced from $500,000 to $475,000) respondent surrendered the majority stock in United States Iron Company, at a valuation of $70 per share, paid balance in cash, and took new certificates. When he solicited and obtained subscriptions and received payments, he knew subscribers were relying upon him faithfully to act as their agent. Subsequent to the specified transactions petitioner and his assignors discovered respondent's interest, and thereupon promptly elected to rescind their subscriptions, gave due notice to the managers, offered to return and restore all stock received, and demanded their money.

Relying on *Heckscher* v. *Edenborn*, 203 N. Y. 210, the referee reported that Edenborn was liable for amounts paid, with interest, and final judgment therefor was duly entered. The Circuit Court of Appeals declined to follow the state court, and, being of opinion that, "it is a condition of rescission that the status quo shall be restored," and that no such restoration had been offered, reversed the trial court (206 Fed. Rep. 275, 277). The cause is here upon writ of certiorari.

Heckscher v. *Edenborn* arose out of another subscription to the agreement now involved, and the essential facts there and here are substantially alike. After much consideration the Court of Appeals decided in favor of plaintiff, Heckscher, holding the agreement was vitiated by fraud because Edenborn failed to reveal his interest in the stock intended to be purchased, and further that tender of stock actually received was all the subscriber could do towards restoring the original position, and constituted an adequate preliminary to an action for recovery. The opinion expresses that court's deliberate conclusion upon the issues, and is supported by reference to earlier decisions of its own and other authorities.

Petitioner now contends that the Court of Appeals was correct upon principle, and moreover, that if doubts exist they should be resolved in favor of its opinion. On the other hand, respondent maintains the questions involved are of general law and that the state court reached an unwarranted result not to be accepted here.

This court has many times considered how far federal tribunals, when undertaking to enforce laws of the States, should follow opinions of their courts. The authorities were reviewed, and rule announced in *Burgess* v. *Seligman*, 107 U. S. 20, 33, 34, 35, which declared that, as to doctrines of commercial law and general jurisprudence, the former exercise their own judgment, "But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt." This has been often reaffirmed. *Wilson* v. *Standefer*, 184 U. S. 399, 412; *Bienville Water Supply Co.* v. *Mobile*, 186 U. S. 212, 220; *Stanly County* v. *Coler*, 190 U. S. 437, 444–445; *Great Southern Hotel Co.* v. *Jones*, 193 U. S. 532, 547; *Tampa Water Works Co.* v. *Tampa*, 199 U. S. 241, 243–244; *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349, 357–360, 361; *Ennis Water Works* v. *City of Ennis*, 233 U. S. 652, 657–658; *Moore-Mansfield Co.* v. *Electrical Co.*, 234 U. S. 619, 625; *Lankford* v. *Platte Iron Works Co.*, 235 U. S. 461, 474.

The conclusions of the Court of Appeals in *Heckscher's Case* are not in direct conflict with any declared views of this court, and some expressions in our former opinions tend to support them. *Veazie* v. *Williams*, 8 How. 134, 158; *Andrews* v. *Hensler*, 6 Wall. 254, 258; *Neblett* v. *Macfarland*, 92 U. S. 101, 103, 104–105.

Through misleading representations and suppression of facts, respondent induced syndicate subscribers to become parties to an agreement creating him their agent to acquire and deal with certain properties—a position

of especial trust and confidence. His original undisclosed purpose was to obtain their money and appropriate it toward purchase of something partly owned by himself. Having led them to intrust their funds to his discretion, he carried out his preconceived plan, and as a part of it caused them to receive an equivalent amount of corporate stock. He now seeks to avoid a judgment, because his own actions have rendered it impossible for him to get back to the beginning point.

This was not a proceeding in equity addressed to the court's discretion, but a demand at law upon an agent for return of something improperly received and disposed of. The defrauded principals tendered back everything received by them—did all they could towards restoring original conditions. In such circumstances it is but just and right that any loss should fall on the unfaithful agent, not on his too-confiding principals. See *Snow* v. *Alley*, 144 Massachusetts, 546, 551; *O'Shea* v. *Vaughn*, 201 Massachusetts, 412; Bigelow on Fraud, 430–431; Wharton on Contracts, § 285.

We think, in *Heckscher* v. *Edenborn*, the Court of Appeals reached a result well supported both by reason and upon authority, and that the courts below should have followed it when undertaking to determine rights depending upon the laws of New York. The action of the Circuit Court of Appeals is accordingly reversed; and the judgment of the trial court is affirmed.

Reversed.

MR. JUSTICE McKENNA, MR. JUSTICE DAY and MR. JUSTICE VAN DEVANTER dissent, being of opinion that the questions involved are of general, not local, law; that there has not been such restoration of the *status quo* as is essential to a recovery at law upon a rescission, and that upon the facts specially found by the referee the decision of the Circuit Court of Appeals was right.

ALDER *v.* EDENBORN.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 9. Argued May 5, 1915; restored to docket for reargument April 3, 1916; reargued October 23, 1916.—Decided December 4, 1916.

Decided on authority of *Sim* v. *Edenborn*, *ante*, p. 131. 206 Fed. Rep. 275, reversed.

Mr. Theron G. Strong for petitioner.

Mr. Joseph W. Bailey, with whom *Mr. Martin W. Littleton* and *Mr. Owen N. Brown* were on the briefs, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

This cause is similar in all essential respects to *Sim* v. *Edenborn*, just decided. Accordingly, the Circuit Court of Appeals' action is reversed and the judgment of the trial court is affirmed.

Reversed.

MR. JUSTICE MCKENNA, MR. JUSTICE DAY and MR. JUSTICE VAN DEVANTER dissent.